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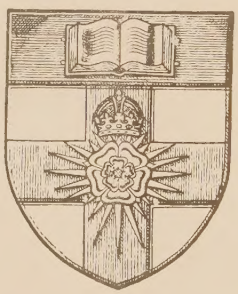

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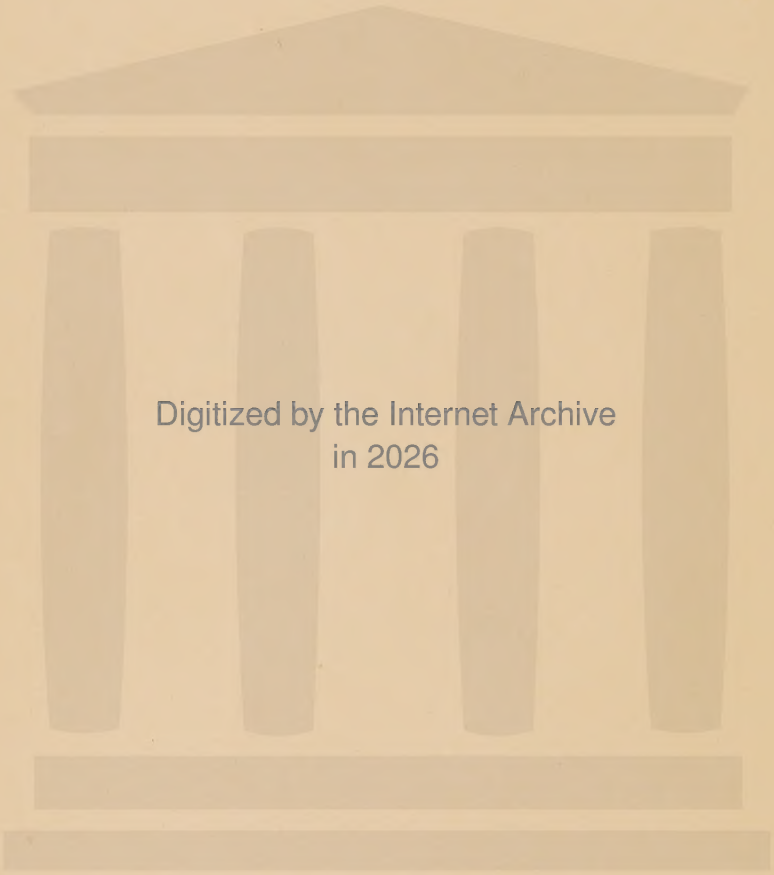
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

LEWIS, APPELLANT *v.* DODD, RESPONDENT.

1918
October 17.

Licensing Acts—Offence—Inmate of Licensed Hotel found drunk on premises—Hotel closed for sale of Intoxicants, but open to public for other purposes—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 12.

Sect. 12 of the Licensing Act, 1872, which makes it an offence for a person to be found drunk on licensed premises, applies to an inmate of the premises who is found drunk thereon at a time when, although closed for the sale of intoxicating liquor, they are lawfully open to the public for the sale of food and non-intoxicants.

CASE stated by Monmouthshire justices.

The respondent was charged under s. 12 of the Licensing Act, 1872, (1) with being found drunk on certain licensed premises known as the Navigation Hotel.

It was proved that the respondent was the wife of, and

(1) Licensing Act, 1872, s. 12; "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty . . . . "

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lived with, the licensee of the hotel; that at 10 p.m. on December 13, 1917, a police constable heard a noise in the hotel; that the front door was open, and that he went in and found the passage and rooms of the hotel in disorder; that the licensee was holding his wife (the respondent) against the railings at the top of the stairs; and that she was screaming, and was drunk.

By an Order of the Central Control Board (Liquor Traffic) for the Welsh area the hotel had to be closed for the sale of intoxicating liquor at 9 p.m., but it could remain open for the sale of food and non-intoxicants till 11 p.m.

The justices found that the respondent was drunk on the licensed premises; that at the time of the alleged offence the premises were not licensed premises open to the public for the purposes of the licence; and that as the premises were the house and residence of the respondent it was not an offence under the section for her to be drunk on the premises at that time. They accordingly dismissed the information subject to the opinion of the Court as to whether they were right in law in so doing.

Micklethwait, for the appellant. The justices were wrong in holding that, because the premises in question were not open to the public for the purposes of the licence, the respondent could not be convicted under s. 12 of the Licensing Act, 1872. Although the reasoning in *Lester* v. *Torrens* (1) has been declared to be erroneous in *Reg.* v. *Pelly* (2) and *Young* v. *Gentle* (3) the construction put upon the words "licensed premises" by Lush J. in *Lester* v. *Torrens* (1), approved in *Young* v. *Gentle* (3), shows that the respondent in this case came within the section. Lush J. there said that "licensed premises" for the purposes of the section "must mean premises open to the public during licensed hours, or during the time when the premises are a quasi public place." In this case the hotel was undoubtedly a quasi public place, for at the time in question the public were entitled to enter to obtain food and non-intoxicants.

(1) (1877) 2 Q. B. D. 403, 405. (2) [1897] 2 Q. B. 33.
(3) [1915] 2 K. B. 661.

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R. O. B. Lane, for the respondent. The justices were right. A licensed house continues to be "licensed premises" even after closing hours, but whether transactions of selling intoxicating liquor can be carried out therein depends upon whether the house, at the particular time, may be lawfully open for that purpose. In this case the hotel, for the purposes of its licence, was closed at the material time. But whether the premises were closed or open is immaterial, because the respondent was an inmate using the premises as her private house. The decision in *Young* v. *Gentle* (1) involves the proposition that an inmate is not a "person" within s. 12. The protection to inmates given by the authorities is given to them in their capacity of private persons.

DARLING J. In my opinion the justices came to a wrong conclusion, and consequently the case must be remitted to them with instructions to convict the respondent.

The case of *Lester* v. *Torrens* (2) which has been cited to us was explained by Lord Reading C.J. in *Young* v. *Gentle* (3) where he said, "The decision in *Lester* v. *Torrens* (2) is to be supported upon the ground that persons of the class I have mentioned"—that is, lodgers and other inmates—"are on the licensed premises in their capacity of residents in a private house, not that the premises cease to be licensed premises." That is entirely in accord with what Lush J. said in *Lester* v. *Torrens* (2), and I will read his observations because they were quoted and assented to by Avory J. in *Young* v. *Gentle* (4): "I think, looking at the collocation of words, that 'licensed premises,' for the purposes of the section, must mean premises open to the public during licensed hours, or during the time when the premises are a quasi-public place. It seems to me that the innkeeper, if drunk on his own premises while they are open, is as much amenable to the penalty as if he was found drunk on the highway. It is clear, however, that the section does not apply to a person, not being an innkeeper, found drunk in his own private house. If the innkeeper lived next door to the licensed premises, he might

(1) [1915] 2 K. B. 661.
(2) 2 Q. B. D. 403, 405.
(3) [1915] 2 K. B. 661, 670.
(4) [1915] 2 K. B. 672.

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be drunk in his own house without being liable. Why should he be liable if he lives on the licensed premises and gets drunk at a time when they are not open, because during certain hours of the day they are open to the public? When they are closed, they are as much his private house as a house in which he lives next door." Avory J. added: "It is clear that these observations would apply equally to the case of a lodger." It comes to this, therefore, that an innkeeper, or his wife, or his lodger, is a resident in a private house, and no more amenable to the law for being drunk therein than any other person found drunk in his private house if at the time he or she is found drunk the licensed premises are not a public place. Sometimes the premises are a private house, at other times they are a public house, but all the time they are licensed premises; and therefore what we have to consider is whether at the time of the alleged offence the premises are a public place in the sense that they are open to the public. In this case the hotel, which was a fully licensed house, was not open for the sale of intoxicating liquor at the time the respondent was found drunk therein, but was still open for the public to enter for the purpose of obtaining food or non-intoxicating liquor. It remained, therefore, in my opinion, a licensed public house, used as such for certain, although not for all, purposes. It was, therefore, not a private house at the time in question.

AVORY J. I agree. The respondent was summoned under s. 12 of the Licensing Act, 1872, which imposes a penalty upon every person found drunk in any highway or other public place, whether a building or not, or on licensed premises. I need not repeat what I said in *Young* v. *Gentle* (1) as to the obvious, literal meaning of these words. The respondent was, in fact, found drunk on the licensed premises, and but for the restriction placed upon the language of the section in *Lester* v. *Torrens* (2) it would not be open to argument that the premises were at the time in question licensed premises. The effect of the decision in *Lester* v. *Torrens* (2) and of *Reg.* v.

(1) [1915] 2 K. B. 661, 670. (2) 2 Q. B. D. 403, 405.

Pelly (1) must now be taken to be what it was said to be by this Court in *Young* v. *Gentle*. (2) As Lord Reading C.J. said in *Young* v. *Gentle* (3), the decision in *Lester* v. *Torrens* (4) is to be supported upon the ground that persons of the class mentioned are on the licensed premises in their capacity of residents in a private house, and not that the premises ceased to be licensed premises. In other words, the question is whether at the time the person is found drunk the premises on which he was found in that condition are, or are not, a private house. This view is confirmed by a reference to the Licensing Act, 1902, which by s. 1 provides that "if a person is found drunk in any highway or other public place, whether a building or not, or on any licensed premises, and appears to be incapable of taking care of himself, he may be apprehended and dealt with according to law." It will be observed that s. 12 of the Act of 1872 merely imposes a penalty, and gives no power to apprehend the offender, whereas the Act of 1902 gives a power to apprehend. By s. 8 of the latter Act the expression "public place" is defined thus: "For the purposes of s. 12 of the Licensing Act, 1872, and of ss. 1 and 2 of this Act, the expression 'public place' shall include any place to which the public have access, whether on payment or otherwise." In this case it is clear that the premises at the material time were a public place, a place to which the public had access, for the justices have found that the front door was open and that the hotel was open for the public to come in and purchase anything in the shape of food or drink other than intoxicating drink. It is clear that the respondent could have been apprehended for being found drunk in a public place, and she was liable to be fined for this offence. The justices were therefore wrong in holding that because the premises were not open for the sale of intoxicating liquor they ceased to be licensed premises and ceased to be a public place.

SALTER J. I agree. I can find no warrant either in the statute or in the decided cases for placing any limitation

(1) [1897] 2 Q. B. 33.
(2) [1915] 2 K. B. 661, 670.
(3) [1915] 2 K. B. 670.
(4) 2 Q. B. D. 403, 405.

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Salter J.

upon the words "every person" in s. 12 of the Act of 1872. I think the words "any licensed premises" mean licensed premises open to the public. At the time in question this hotel was, in fact, open to the public, although not for the sale of intoxicating drink. I think the case, therefore, comes within the section, and the justices ought to have convicted.

Appeal allowed.

Solicitors for appellant: *Taylor, Rowley & Lewis, for F. Lyndon Cooper, Newport, Mon.*

Solicitors for respondent: *Kinch & Richardson, for D. Edward Jones, Abertillery.*

J. S. H.

1918
October 17.

LUCAS, APPELLANT *v.* HODSON, RESPONDENT.

Weights and Measures—Coal—Delivery by means of Vehicle—Non-delivery of Ticket—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.

Sect. 20 of the Weights and Measures Act, 1889, provides that, except in certain specified cases, coal shall be sold by weight only.

Sect. 21, sub-s. 1: "Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note" showing the quantity of coal the purchaser is to receive.

The appellant, a coal dealer, while in charge of a horse and lorry in a street, having sacks of coal on the lorry, was asked by a woman to bring her three sacks of coal. The appellant and his assistant then carried three sacks from the lorry to the woman's house. Each of the sacks contained 1 cwt., and had a metal label thereon stating that the sack contained that weight of coal. No ticket or note was delivered to the woman showing the quantity of coal delivered.

Held, (1) that sect. 21 is not limited in its application to the delivery of coal in fulfilment of a contract previously entered into; (2) that there was a "delivery by means of a vehicle," notwithstanding that the delivery was partially effected by the appellant and his assistant carrying the coal from the vehicle to the purchaser's house; and (3) that the appellant, in failing to deliver a ticket or note to the purchaser, had contravened s. 21.

CASE stated by Blackburn justices.

The appellant, a coal dealer, was charged with a contra-

vention of s. 21 of the Weights and Measures Act, 1889, (1) by selling a quantity of coal exceeding 2 cwt., namely, 3 cwt., and delivering the same by means of a vehicle to one Geraldine Cunningham without delivering or causing to be delivered to her before the coal was unloaded a ticket according to the form set out in Sched. III. of the Act.

On January 15, 1918, while the appellant was in charge of a horse and lorry in a street in Blackburn, having sacks of coal on the lorry, the said Geraldine Cunningham shouted to him to bring her three sacks of coal. The appellant and his assistant then carried three sacks from the lorry to Geraldine Cunningham's house, close to which the lorry was standing. Each of the sacks contained 1 cwt., and had a metal label thereon stating that the sack contained that weight of coal. After the delivery the appellant was asked by a police constable if he had left a delivery note. To this the appellant replied, "No, it is a mistake; I should have done so."

At the hearing the respondent contended that the appellant was bound to deliver a ticket to the purchaser before any part of the coal was unloaded.

The appellant contended that, in the circumstances, he was under no obligation to deliver a ticket.

The justices were of opinion that the delivery of the coal was a delivery within the meaning of the section, and that the appellant had been guilty of an offence in failing to deliver to the purchaser a ticket or note according to Sched. III.

(1) Weights and Measures Act, 1889, s. 21, sub-s. 1: "Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the third schedule to this Act, or according to a form to the like effect."

Sub-s. 2: "If default is made in complying with the requirements of this section with respect to the delivery or sending of a ticket or note, or if the quantity of coal delivered is less than the quantity expressed in the ticket or note, the seller of the coal shall be liable to a fine not exceeding five pounds."

Sched. III. prescribes the form of ticket to be delivered to the purchaser of coal, showing the quantity of coal he is to receive.

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The question was whether the justices came to a right determination in law.

A. M. Latter for the appellant. Sect. 20 of the Weights and Measures Act, 1889, deals with the sale of coal, and provides that it shall be sold by weight only. Following upon that, s. 21, under which the appellant was convicted, provides for the delivery of coal, and that must be read as referring only to the delivery by means of a vehicle of coal as to which a contract of sale has been entered into before the vehicle has started from the seller's yard. In this case there was no contract until the purchaser called to the appellant to bring her three sacks of coal from the lorry. Such a transaction is not hit by the section. Further, there was no delivery of the sacks of coal "by means of any vehicle"; the delivery was by the appellant and his assistant carrying the sacks on their backs to the purchaser's house. Again, there was a complete contract for the sale of each sack, and as it weighed 1 cwt. only, the section has no application. The conviction was therefore wrong.

[He referred to *Knowles & Sons* v. *Sinclair*. (1)]

Moresby for the respondent. The conviction was right. The language of s. 21 of the Act is explicit, and there is no ground for the contention that it only applies to a delivery of coal in fulfilment of a contract previously entered into. In this case the transaction was clearly within the section, as there was a delivery of a quantity of coal exceeding 2 cwt. from a vehicle. As a delivery of 3 cwt. was asked for it is immaterial that three separate journeys from the lorry to the purchaser's house were required to carry it out. [He referred to *Kyle* v. *Dunsdon*. (2)]

A. M. Latter in reply. To come within the section the delivery has to be, not "from a vehicle," but "by means of a vehicle." Here there was no delivery "by means of a vehicle."

DARLING J. I regret to come to the conclusion that this appeal should be dismissed, because it is plain that the appellant

(1) [1898] 1 Q. B. 170.

(2) [1908] 2 K. B. 293.

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Darling J.

did nothing dishonest. The only question is whether he complied with the terms of s. 21, and the answer to that depends upon whether he delivered the coal "by means of a vehicle," for if he did, it was obligatory on him to give a ticket in the form prescribed by the schedule to the Act. He was going through the street with a vehicle on which were sacks of coal. A woman called to him to deliver to her 3 cwt. How did he deliver the coal? I should say by means of the vehicle which he brought near to the woman's house, and then by taking the sacks off the vehicle and carrying them to the house, the delivery being thus contributed to by the vehicle and by himself and his assistant. Although the language might seem to point only to deliveries of coal in pursuance of a previous complete sale, that is, a sale before the vehicle started, I do not think that that is its meaning. On the construction of the section I think an offence was committed by the appellant.

AVORY J. In this case the evidence shows that an offence was committed. I agree, therefore, that the appeal should be dismissed, but I do not share the regret expressed by my lord; for it seems to me that s. 21 applies equally to the man who behaves honestly and to him who is minded to act dishonestly. Sub-s. 2 of the section expressly provides that if a seller fails to comply with the requirements of the section with regard to the delivery or sending of a ticket, or if the quantity delivered is less than the quantity expressed on the ticket, he shall be liable to a penalty. If the seller fails in either respect, that is, whether he merely fails to comply with the direction to deliver or send a ticket, or whether he is guilty of dishonesty in delivering less than the proper quantity, he is rendered liable to a penalty. I cannot assent to Mr. Latter's argument that s. 21 only applies where there has been a previous contract of sale which is being carried out by means of a delivery from a vehicle. I can see nothing to justify that limitation being put upon the words of the section. Nor can I see anything in the argument that this coal was not in fact delivered "by means of a vehicle," but was delivered by the men who carried it from the vehicle

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AVORY J.

to the woman's house. If that argument were sound the section could only apply to a case where the vehicle could be backed up to the purchaser's house and the contents shot directly into the yard or cellar. That is not the meaning of the section.

SALTER J. I agree. The Weights and Measures Act, 1889, is intended to ensure that a buyer of coal shall receive full weight; and it effects this object in two ways: first, by providing for the erection and use of weighing machines; and secondly, by enacting s. 21, which requires, in the case of sales beyond a certain weight, the delivery of a ticket showing the purchaser the quantity of coal he is to receive. This ticket is to be delivered or sent where the coal exceeds 2 cwt., and where it is delivered "by means of any vehicle." The only doubt I have felt in this case is whether the 3 cwt. of coal was delivered to the purchaser by means of the appellant's coal cart within the ordinary meaning of the words of s. 21. Upon the whole I think there was a delivery "by means of a vehicle," and therefore I agree that the conviction was right.

Appeal dismissed.

Solicitors for appellant: *Busk, Mellor, and Norris, for H. Backhouse, Blackburn.*

Solicitors for respondent: *Haslewood, Hare & Co., for Radcliffes & Higginson, Blackburn.*

J. S. H.

J. LYONS & CO., LIMITED, Appellants *v.* FOX, Respondent.

1918
October 14.

Revenue—Entertainments Duty—Restaurant—Musical Performance during Service of Meals—"Payments for Admission"—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1.

By s. 1, sub-s. 1 of the Finance (New Duties) Act, 1916, an excise duty, called "entertainments duty," is to be charged "on all payments or admission to any entertainment" as defined by the Act.

In a restaurant, of which the appellants were the proprietors, concerts of a high-class character, and consisting of vocal and orchestral music, were given during and after the service of teas and dinners. No person was admitted to the restaurant unless he was about to take a meal, but a person who had finished his meal was allowed to remain. The dinner concert continued for one hour after the service of dinner had ceased. No charge was made in any form except for the meals, which were served both at a fixed price and à la carte, and for which a bill was rendered to the customer before he left the restaurant.

Held, by Darling, A. T. Lawrence and Bailhache JJ., Shearman and Salter JJ. dissenting, that the payments made by the customers of the restaurant were not "payments for admission" to an entertainment within the meaning of s. 1, sub-s. 1 of the Finance (New Duties) Act, 1916, and that the entertainments duty was, therefore, not chargeable in respect thereof.

Case stated by a metropolitan police magistrate.

Two informations were preferred by the respondent, an officer of Customs and Excise, charging that on March 3 and 4, 1917, at the Trocadero Restaurant, Shaftesbury Avenue, in the County of London, certain persons were admitted for payment to a place of entertainment where the payment was subject to entertainments duty, otherwise than in compliance with the provisions of s. 1 of the Finance (New Duties) Act, 1916, (1) and that the appellants were the proprietors of the said entertainments.

(1) Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), s. 1: "(1) There shall, as from May 15, 1916, be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty (in this Act referred to as 'entertainments duty') at the following rate . . . . ."

"(2) No person shall be admitted for payment to any entertainment where the payment is subject to entertainments duty except—

"(a) with a ticket stamped with a

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The informations were heard together, and the facts proved or admitted were in substance as follows :—

The appellants carried on business as caterers and restaurant proprietors, and were the proprietors of the Trocadero Restaurant and a number of other restaurants. At the Trocadero there were three rooms in which different kinds of meals were served, known as the grill room, the restaurant, and the empire room. In the grill room meals were served during $12\frac{1}{2}$ hours of the day on week days and 7 hours on Sundays, and music was provided for about 6 hours a day on week days and $4\frac{1}{4}$ hours on Sundays. The meals served were à la carte, and the same prices were charged during the whole time the grill room was open. In the restaurant meals were served during 8 hours on week days and 7 hours on Sundays. Music was provided for about 4 hours on each day. On Sunday evenings the music was partly vocal. The meals were served both table d'hôte at 6*s.* 6*d.* and 11*s.* 6*d.* and also à la carte.

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stamp (not before used) denoting that the proper entertainments duty has been paid; or

(b) in special cases with the approval of the Commissioners, through a barrier which, or by means of a mechanical contrivance which, automatically registers the number of persons admitted,

unless the proprietor of the entertainment has made arrangements approved by the Commissioners for furnishing returns of the payments for admission to the entertainment and has given security up to an amount and in a manner approved by the Commissioners for the payment of duty.

If any person is admitted for payment to any place of entertainment and the provisions of this section are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted shall be liable in respect of each offence to an excise penalty, in the case of the person admitted of five pounds, and in the case of the proprietor of fifty pounds, and the proprietor shall in addition be liable to pay any duty which should have been paid."

"(6) For the purpose of the provisions of this Act relating to entertainments duty—

"The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held;

"The expression 'admission' means admission as a spectator or one of an audience, and the expression 'payment on admission' includes any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required."

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The same prices were charged during the whole time that the restaurant was open except that on Sundays a better dinner at 7*s.* was served in the place of the 6*s.* 6*d.* dinner, as well as the usual 11*s.* 6*d.* dinner. In the empire room tea was served from 4 to 6 daily, and music, vocal and orchestral, was provided during 1½ hours of that time. The tea was served at a fixed price of 2*s.* 6*d.* for civilians or 1*s.* 6*d.* if an officer of H.M. Forces was a member of the party, the average price charged working out at 1*s.* 9*d.* per person. The meal provided in the empire room consisted of tea, coffee, chocolate, sandwiches, cakes, etc., and there was no limit as to the quantity of food and drink which a visitor might consume.

The public were not admitted to these rooms unless they were about to take meals, and on the implied terms that they would make payments to the appellants as above stated. A person who had finished his meal was permitted to remain in the room. It was alleged by the appellants that persons did not, as a general practice, remain after finishing their meals, but more specific evidence was given as to the Sunday evening concerts and dinner. On Sunday evenings there was orchestral music in the earlier part of the evening, but the vocal part of the concert did not begin until 9 o'clock, at which hour, in consequence of the regulations as to rationing, dinners ceased to be served, and the concert continued until 10 o'clock. Twenty-five to 30 per cent. of the people left before 9 o'clock. There was no vocal music provided on week days at or after dinner. On week days the majority of the diners were theatre-goers. A different class of people, persons who were not seen in the restaurant on week days, attended the Sunday dinners.

No charge was made in form to any person except for the meal which he took, for which a bill was rendered in the ordinary way.

The appellants inserted advertisements in the Sunday newspapers containing announcements as to the musical arrangements for the forthcoming week, including the names of the vocalists engaged for the tea concerts and for the Sunday evening concert in the restaurant. Similar announcements

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were inserted in the programmes of the music to be performed at the Sunday evening concert, which were placed on the tables in the restaurant, and notices to the same effect were exhibited in the windows.

The tea room was fitted with a platform raised about 19 inches from the floor, accommodating an orchestra of 8 instrumentalists and a vocalist. In the dining-room there was a raised platform such as was to be found in ordinary concert rooms. The service of tea was suspended during the performance of the vocalist. On March 3, during the time after 5.15 p.m. when Customs officers were present, three songs were sung and four orchestral selections were performed. The evening concert on Sunday, March 4, was an average high-class West-end concert. The provision of music was a common practice at restaurants.

The prices to be charged at all the appellants' restaurants, including the Trocadero, were fixed at their head office, and were regulated by the cost of the food supplied. Evidence was given by the appellants that in fixing the prices of meals the price of orchestral and vocal music was not taken into consideration, that the orchestra was charged to wages account and the vocalists to advertising account, and that the music did not affect the price of meals; but it was admitted by the appellants' witness that the cost of the concerts came out of the moneys received by the appellants, and that if the restaurant paid its way it paid for the meals, advertisement, music and all other matters.

The object of providing music was to attract persons to the restaurant for their meals, and thus to increase the volume of trade. Other attractions, such as flowers and other elegances and amenities, were provided, but there was no evidence showing whether any other attractions but music were advertised.

On March 3, 1917, two Customs officers attended at the Trocadero Restaurant and had tea in the empire room, for which they paid 2*s.* 6*d.* each. One of the officers inquired of the appellants' superintendent whether he could hear the concert without charge, and was informed that to hear the

concert he must have "a concert tea for 2*s.* 6*d.*" On Sunday, March 4, one of the officers made a similar inquiry in the restaurant, and the superintendent stated that to hear the concert it was necessary to have a dinner at 7*s.* or 11*s.* 6*d.* At a subsequent interview with one of the appellants' directors the latter informed one of the officers that if he went at 6 p.m. he could stay till 11, that he would have to pay the same amount whether he went to the concert or not, but if he went early he could stay late for the concert, that the charge for the dinner did not include the charge for the concert, and that the payment included everything, the flowers on the table, carpets, appointments, etc., and also the directors' salary, etc.

On March 3 a number of persons were admitted to the tea room during the time when the musical performance was taking place, and made payments of 2*s.* 6*d.* or 1*s.* 6*d.* as set out above. On March 4 a number of persons were admitted to the restaurant before the musical performance took place, and were permitted to remain during the performance, and made payments varying according to the dinners and drinks partaken of by them, but out of 260 diners 216 took a fixed price dinner. These persons were admitted (a) without any ticket stamped with a stamp denoting that entertainments duty had been paid; (b) without any barrier or mechanical device automatically regulating the number of persons admitted; nor had the appellants made arrangements with the Commissioners for furnishing returns of the payments made to the appellants.

On the part of the appellants it was contended (a) that the music above referred to was not "an entertainment" within the meaning of the Finance (New Duties) Act, 1916; (b) that there was no "admission to any entertainment" within the meaning of the Act; (c) that there was no "payment for admission to any entertainment" within the meaning of the Act, and that no person was admitted for payment to any entertainment; (d) that the sums paid for the teas or dinners consumed by the customers of the appellants were the prices of the actual meals supplied, and were not payments for

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admission to hear the music, and in fact did not include any part of the cost of the music; (e) that the evidence showed that the music was a mere accessory or incident of, and an advertising attraction for, the teas and dinners, and in the same relation thereto as table decorations and other amenities, and did not convert the tea or dinner into an entertainment; (f) that on the facts stated no offence had been committed.

On the part of the respondent it was contended that the appellants held out the privilege of hearing musical performances both at their teas and their Sunday dinners as a material and valuable inducement to the public to visit and enter their premises; that the concerts, both at dinner and tea, were of a substantial character, constituting an important element in the attractions offered to the public by the appellants; that both in law and in fact these concerts constituted entertainments; that the public attended the restaurant with the knowledge and expectation that they would listen to these performances; that payments were made by the public for admission to and for the musical performances as well as for and to the dinner or tea, and that the former were not mere accessories of the latter; that it was impossible to contend that these performances were mere gratuitous public performances; that on the occasion in question the evidence showed that payment was made for admission to an entertainment, and that on the whole circumstances of the case the appellants had committed the offence charged.

Upon the facts above stated, the magistrate was of opinion that the amounts paid by the two Customs officers on March 3 were in fact amounts paid not only for their teas, but also in respect of the musical performance which was taking place while tea was being served. He was further of opinion that the amounts paid by the same two persons on March 4 were in fact amounts paid not merely for the dinner, but also for admission to the concert which followed the dinner, and he held that in law the Customs officers were admitted for payment to a place of entertainment within the meaning of the Finance (New Duties) Act, 1916, and that as the provisions of s. 1 of the Act had not been complied with an offence had been

committed by the proprietors of the entertainment both on March 3 and March 4, 1917.

The question for the opinion of the Court was whether the magistrate came to a correct conclusion in point of law.

Upjohn K.C. and *Douglas Hogg K.C.* for the appellants. The Finance (New Duties) Act, 1916, does not impose a tax on entertainments but "on all payments for admission" to an entertainment. The facts found by the magistrate show that there was no payment for admission to an entertainment in this case. The only payment was for the food supplied, and the payment was the same whether the customer was present during the concert or not. The definitions of "entertainment" and "admission" in sub-s. 6 of s. 1 show that the Act was dealing with entertainments in the ordinary sense of the word, where payment for admission is made before, or simultaneously with, admission. The machinery prescribed by sub-s. 2 of s. 1 for the collection of the duty would be quite unworkable in a case like this where at the time of admission it is uncertain what sum is going to be paid by the customer. The appellants were under no legal obligation to their customers to provide music during tea or dinner, at most there was a representation that they would do so.

[SHEARMAN J. referred to *Carlill* v. *Carbolic Smoke Ball Co.* (1)]

The music was merely incidental to the meals, and must be regarded as in the same category as the flowers and other amenities provided: *Attorney-General* v. *McLeod.* (2)

The practice of providing music at restaurants has been in existence for upwards of thirty years, and if it had been intended to apply the Act to these cases the language used should have been clear and unmistakable. That is not the case, and, therefore, by reason of the rule of construction applicable to taxing Acts, the appellants are not liable.

Sir Gordon Hewart S.-G. and *Giveen* for the respondent. By s. 1, sub-s. 6 of the Act "entertainment" includes any "performance" "to which persons are admitted for

(1) [1893] 1 Q. B. 256. (2) [1918] 1 K. B. 13.

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payment." There are, therefore, two questions to be determined. First, was that which was done a performance; and, secondly, were persons admitted to that performance for payment? Both questions are questions of fact, and there was ample evidence on which the magistrate could find, as he did, adversely to the appellants. The fact that the collection of the duty might in the circumstances of this case be attended with difficulty is due solely to the manner in which the appellants conduct their business. In any case it is an immaterial consideration. It is not necessary that the payment should be before or at the time of admission. "Payment for admission" means payment in respect of admission. Admission covers not only the physical act of entering the building but every right which the entry confers, including, in this case, the right to hear a concert. [*Sarpy* v. *Holland* (1) was referred to.]

Upjohn K.C. replied.

SALTER J. In this case there were two summonses against the appellants for having on March 3 and 4 admitted persons for payment to a place of entertainment without having complied with the provisions of the Finance (New Duties) Act, 1916, as to the payment of entertainments duty. The magistrate convicted the appellants in both cases, and the question is whether he was in error in law in so doing. I am of opinion that the questions which the magistrate had to decide were questions of fact, that there was evidence on which he could decide as he did, and that he did not give an erroneous decision in point of law. The afternoon tea concert is the simpler case. The facts with regard to that are that any one can go to the Trocadero Restaurant and listen to a concert between 4.30 and 6 in the afternoon. If any person does so, it is an understood thing that he will be served with tea for which he will be required to pay 2*s.* 6*d.* I think that is a case in which the appellants give a concert, to which the tea is merely incidental, and any person who comes to the empire room comes to a place of entertainment within the meaning of the Act and pays for admission to that place.

(1) [1908] 1 Ch. 443.

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The facts of the other case, the Sunday dinner concert, give rise to more difficulty. On Sunday nights the orchestra plays during dinner in the restaurant in the ordinary way. No exception is taken to that. But after dinner, at 9 p.m., there is a formal good-class concert. If I had been the magistrate who had to find the facts, I think I should have had some doubt whether the diners paid for admission to an entertainment or whether the concert was not really incidental to the dinner; but the magistrate has found as a fact that the payments were not merely for the dinner but also for admission to the concert which followed the dinner, and there was, in my opinion, evidence on which he could so find. In both cases there was a musical entertainment, and the place where it was given was, therefore, a place of entertainment to which the public were admitted. That being so, the question is, not whether the public paid for the entertainment, but whether they paid for admission to the entertainment. I do not think that the magistrate came to a wrong decision in law in finding that the Customs officers paid not only for the entertainment but for admission to the entertainment. The duty imposed by this Act is a luxury tax, the object of which is to obtain a contribution towards exceptional expenditure from those who have spare money to spend on entertainments. It is true that the machinery of the Act is not very well adapted to cases of this kind, but the provisions of sub-ss. 1 and 4 of s. 1 are, I think, sufficient to show that this class of entertainment has not been entirely overlooked by the Legislature, and that in cases of this sort restaurant proprietors must adopt the necessary precautions to prevent non-compliance with the Act. For these reasons I am of opinion that this appeal should be dismissed.

SHEARMAN J. I am also of opinion that these convictions should be affirmed. As I understand this Act, the scheme was to levy a luxury tax upon the individual person who was willing to pay money in order to be present at an entertainment, and the Legislature proceeded to levy the tax at the source by providing in s. 1, sub-s. 1 that "no person shall

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be admitted for payment to any entertainment where the payment is subject to entertainments duty" unless the formalities prescribed by the Act have been complied with, thus ensuring that the tax will be paid by every person going to an entertainment who pays for admission to the entertainment. By sub-s. 6 of s. 1, the expression "entertainment" is defined as including any "performance . . . . to which persons are admitted for payment." It is quite clear to my mind that both the tea concerts and the dinner concerts in this case were entertainments to which the Act applies. Sub-s. 6 also defines the expression "admission to an entertainment" as including "admission to any place in which the entertainment is held." The Act was therefore intended to apply to a case where there was payment for admission to a place where an entertainment was being given. Without going in detail through all the facts stated in the case, I will take the case of the tea room. It was open at 4 p.m.; from 4.30 to 6 there was a concert. No one was allowed to enter the room whilst the concert was going on unless he was prepared to pay 2*s.* 6*d.*, and the magistrate has found as a fact that that payment was made not only for the tea which was served, but also in respect of the concert which was given during part of the time that the tea was being served. As it was impossible either to obtain tea or to hear the concert without first getting admission to the room, it seems to me to be too subtle an argument to say that the 2*s.* 6*d.* was not paid for admission to the room. The magistrate has found as a fact that persons did pay for admission, and I think there was ample evidence on which he could so find.

BAILHACHE J. I regret that I have come to the opposite conclusion. I think that these convictions were wrong. The question is whether the appellants should have made arrangements for the payment of the entertainments duty in respect of persons who were admitted to the tea room and to the restaurant at times when the concerts were taking place. That depends on the meaning of certain words in s. 1 of the Finance (New Duties) Act, 1916. The question is not, in

my opinion, purely one of fact, for when the facts have been ascertained it is a question of law whether on the true construction of the Act the facts bring the case within the provisions of the Act. By s. 1, sub-s. 1 the entertainments duty is to be charged " on all payments for admission to any entertainment " as defined by the Act. The question, therefore, which we have to determine is, what is the meaning of those words " payment for admission " to an entertainment in that section. I ask myself whether any ordinary intelligent person who had taken tea or had dined at the Trocadero would, using ordinary language, say that he had paid for admission to the Trocadero. The answer to that question must be in the negative. In ordinary language when one has paid for a dinner in a restaurant, one does not say that one has paid for admission to the restaurant any more than, when one pays for a pair of boots bought in a shop, one would say one was paying for admission to the shop. Then a further question arises. Is there anything in this Act which compels the Court to give to the words " payment for admission " a meaning of a special character, and not the meaning which any person of ordinary intelligence would give to the words? I think not. On the contrary, every line of the Act convinces me that the language used in the Act is used in the ordinary sense in which an ordinary person would use it, and it is therefore quite unnecessary to pray in aid the rule of construction that where the meaning of a taxing Act is doubtful the language must be given that construction which is most favourable to the tax-payer. To my mind there is nothing doubtful about the meaning of the words " payment for admission " to an entertainment. It is true in a sense that payment of the bill for a dinner at the Trocadero includes payment for the musical entertainment which is given during and after dinner, but it is impossible in my opinion to hold that the sum paid for the dinner is a payment for admission to an entertainment within the meaning of this Act. I think, therefore, that this appeal should be allowed.

A. T. LAWRENCE J. I agree with the judgment of Bailhache J. I think the magistrate misconstrued the Act. The question

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is not whether the cost of the concerts was paid to the appellants out of the money paid by the customers for their meals, nor what was the intention of the persons who went to the restaurant. The question is, what does the Act mean? If the Act was intended to hit cases of this kind, and if the language used clearly carries out that intention, then, of course, the Act must be applied, although there may be difficulties in doing so; but I do not think that the Act was intended to apply to this class of case. I think it was aimed at cases where people pay for admission to an entertainment in the ordinary way. The whole scheme of the Act appears to me to be only consistent with that view. No doubt the respondent was admitted to the restaurant where an entertainment was held, and he made a payment, but it is only by straining language that the respondent can be said to have paid for admission to an entertainment within the meaning of this Act. There are numbers of entertainments and sports where there is a payment for admission to the place where the entertainment or sports are being held, and those are what the Act is aimed at. The Act provides that if any person is admitted for payment to a place of entertainment and the tax is not charged, that person as well as the proprietor becomes liable to a penalty. It would, in my opinion, be absurd to say that a person who pays for a dinner at the Trocadero has become liable to the penalty because he has been admitted for payment to an entertainment. It may have been unwise for the Legislature not to have made provision in the Act to meet cases of this kind, but in my opinion it has not done so, and, therefore, the appellants have not been guilty of a contravention of the Act.

DARLING J. This is a difficult case, and I have hesitated a good deal before coming to the conclusion that this appeal ought to be allowed. The difficulty is due to the fact that if it was the intention of Parliament to impose the entertainments duty in the case of concerts given during the service of meals at restaurants, appropriate language for that purpose has not been used in the Act. It may be that it is desirable that this class of entertainment should be taxed, but it is an in-

variable rule that in construing a taxing Act the language of the Act must clearly impose the tax on the subject, and if it does not do so, the Court must hold that the tax has not been imposed. This case can be determined in favour of the Customs authorities only by giving a very strained construction to the language of the Act, and what has mainly convinced me that Parliament did not really intend to tax persons who are served with tea or dinner to the accompaniment of music is that s. 1, sub-s. 2 of this Act enacts that if any person is admitted for payment to any place of entertainment and the provisions of s. 1 are not complied with, the person admitted becomes liable to a penalty of five pounds. If it had been the intention of the Legislature that every person who is served with tea or dinner at restaurants like the Trocadero, without having paid the tax, should become liable to a penalty, the Act should have said so in plain terms, but the terms of this Act are not plain. For example, the tax is imposed on all payments for admission. The expression "payments for admission" is not defined, but there is a definition of "payment on admission," an expression which is nowhere to be found in the Act. Therefore, giving effect to the rule as to the construction of taxing Acts to which I have referred, I think we ought not to strain the language of the Act so as to bring the appellants and their customers within it. The practice of giving musical entertainments at restaurants is not a new one, and if it had been intended to tax this class of entertainment appropriate language for the purpose could very easily have been introduced into the Act. We have been told that the custom of having music with meals has existed for the last 30 years. It is much older than that, for Dryden's "Alexander's Feast" shows that it was the custom in very ancient times.

> "'Twas at the Royal feast for Persia won
> By Philip's warlike son——"
>
> . . . . . .
>
> "Timotheus placed on high
> Amid the tuneful quire,
> With flying fingers touch'd the lyre."

And the effect was afterwards described—an effect which

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the music at the appellants' restaurant may have had on the officers who went there :—

> "Soothed with the sound, the King grew vain;
> Fought all his battles o'er again,
> And thrice he slew the slain."

It is unnecessary for me to recapitulate the facts. I agree with A. T. Lawrence and Bailhache JJ. that the convictions were wrong.

Appeal allowed.

Solicitors for appellants : *Stanley, Woodhouse & Hedderwick.*
Solicitor for respondent : *Solicitor for Customs and Excise.*

F. O. R

HANCOCK (SURVEYOR OF TAXES), APPELLANT *v.* GENERAL REVERSIONARY AND INVESTMENT COMPANY, LIMITED, RESPONDENTS.

1918
July 29;
October 14.

Revenue—Income Tax—Sched. D.—Trade Profits—Deductions—Sale of Annuities—Taxed Income from Investments—Trade Expenses—Retiring Pension—Purchase of Annuity.

The business of a company included the purchase of reversions, the lending of money on the security of reversions, and the sale of annuities. The annuities were payable out of the company's general assets. The company when paying the annuities deducted income tax and retained it for their own use. Their revenue was derived in part from investments from which they received dividends less income tax. In order to arrive at their assessable profits they deducted the full untaxed amount of the annuities from their gross receipts. From the balance so arrived at they deducted the dividends on their investments. They then deducted certain expenses of management, and contended that the final balance represented their assessable profits.

Held, that the company must be taken to have paid the annuities out of the income they received from investments, and that (apart from expenses of management) they could deduct from their profits not the full amount of their dividends but only that amount less the amount of the annuities.

As part of their expenses of management during a certain year the company had deducted from their profits the cost of an annuity to an amount equal to the retiring allowance of one of their officers, describing the sum deducted as "capital cost of retiring allowance." The retiring allowance had always been treated as an admissible deduction.

Held, that the sum expended in purchasing the annuity was an equally admissible deduction.

Principle of *Ounsworth* v. *Vickers* [1915] 3 K. B. 267 applied.

CASE stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts.

The General Reversionary and Interest Company, Limited, appealed against the following assessments made upon them under the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Schedule D, in respect of the profits of the business carried on by them, namely, three additional first assessments of 2138*l.*, 2133*l.*, and 2130*l.* for the years ending April 5, 1911, 1912 and 1913 respectively, and an assessment of 18,602*l.* for the year ending April 5, 1914.

The business of the company included the purchasing or

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lending money on the security of reversions and life interests in possession or expectation and the granting of annuities. Their revenue was derived from reversions falling in or being redeemed, repayments of loans, and other sources, and particularly from investments, from which they received dividends after income tax thereon had been deducted.

In their statements of account they had deducted from their gross receipts the annuities which they paid and other disbursements and so arrived at their gross profits. From these they deducted, first, under the head of "expenses," certain expenses of management and law charges, and secondly, under the head of "deductions," their taxed dividends and certain other small items not in dispute. They contended that the balance after making these deductions represented their assessable profits. Their statement for income tax for the year ending April 5, 1914, was based on the average profits of the three years ending December 31, 1912. Their statement of receipts and disbursements for the year 1910 may be taken as an example of their method of computation. It was as follows :—

	£	s.	d.	£	s.	d.
Value of reversions, &c., at beginning of year				848,377	3	3
Capital invested	117,785	8	8			
Annuity payments	2,140	0	0			
Premiums of Assurance	4,372	17	7			
				124,298	6	3
Annuity premiums				1,722	17	7
Transfer to life risks (for Pension Fund)				1,000	0	0
Reserve for life risks at end of year				66,607	8	2
Balance carried to profit and loss				46,951	16	1
				£1,088,957	11	4
Reserve for life risks at beginning of year (as per last account)	64,292	1	7			
Transfer to life risks	2,315	6	7			
				66,607	8	2
Reversions fallen in	68,820	16	2			
Loans repaid and reversions redeemed ..	30,610	4	5			
Freehold property sold	1,892	10	0			
				101,323	10	7
Receipts for interest, annuities and rents				20,535	15	9
Transfer fees and commissions on assurances				151	1	8
Value of reversions, &c., at end of year (as per actuary's valuation)				900,339	15	2
				£1,088,957	11	4

From this balance of 46,951*l.* 16*s.* 1*d.* they deducted among other amounts 20,662*l.* 6*s.* 8*d.*, the amount of their dividends, and a sum of 1455*l.* 3*s.* 1*d.* about which there was no dispute. They then deducted certain expenses of management (including retiring allowance) and law charges, amounting in all in the year 1910 to 4643*l.* 4*s.* 1*d.* Calculated on this basis the company's taxable profits for the three years ending December 31, 1912, amounted to 44,421*l.* 9*s.*, and the average for those years at 14,807*l.* 3*s.* The sums deducted as annuity payments were gross sums from which income tax had not been deducted. The sums actually paid to the annuitants were paid after income tax thereon had been deducted by the company. The annuities were not charged upon any particular fund, but were payable out of the company's general assets.

The surveyor of taxes adopted the company's statement for income tax with the following exceptions. He deducted the amount of the annuities from that part of the company's income which consisted of dividends and allowed only the balance of dividends as a deduction from the company's total trading profits.

His statement for the year ending December 31, 1910, may be taken as an example of his method of calculation.

	£	s.	d.	£	s.	d.
Gross profits (being balances of revenue accounts carried to profit and loss, after deduction of annuities paid, 2140*l.*) ..				46,951	16	1
Deduct items and adjustments not in dispute				1,455	3	1
				45,496	13	0
Deduct expenses per profit and loss account				4,643	4	1
				40,853	8	11
Deduct—						
Taxed dividends	20,662	6	8			
Less applied in payment of annuities ..	2,140	0	0			
				18,522	6	8
				£22,331	2	3

Proceeding in the same manner he calculated the profits for the years ending December 31, 1911, and 1912 as 13,814*l.* 5*s.* 3*d.* and 19,660*l.* 1*s.* 6*d.* respectively, and the average of the three years as 18,602*l.*

The first question raised by the special case was whether or not the treatment by the surveyor of the annuities paid

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by the company in relation to the taxed income received by the company was correct.

The second question affected only the year ending April 5, 1914. The amount carried by the company to profit and loss in the year ending December 31, 1912, amounted to 43,877*l.* 12*s.* 10*d.* From this sum they deducted under the head of "deductions" 21,734*l.* 1*s.* 7*d.*, and under the head "expenses" 9607*l.* 9*s.* 9*d.* This latter sum was made up of the following items :—

	£ s. d.	£ s. d.
Expenses of management (including retiring allowance, *i.e.*, last annual payment to Mr. D. A. Bumsted, former actuary, of his pension, 666*l.* 13*s.* 4*d.*)	3,926 14 5	
Law charges	686 15 4	
		4,613 9 9
Capital cost of retiring allowance		4,994 0 0
		£9,607 9 9

The facts relating to this question were as follows :—

The company had in their employ for many years an actuary, Mr. Bumsted, who had rendered them very valuable services. He retired in 1905, and the company following their usual practice in such cases awarded him a pension. The amount of it was 666*l.* 13*s.* 4*d.* per annum paid free of income tax. He became consulting actuary to the company at a fee of 100 guineas a year and afterwards became a director. In 1912 the company entered into an agreement with the Clerical, Medical and General Life Assurance Society whereby the latter acquired the bulk of the company's share capital. No provision was made with regard to Mr. Bumsted's pension. That was not affected by the agreement, although provision was made for the retirement of and for compensation to be made to directors. In 1913, "entirely as a matter of domestic arrangement," as stated in the special case, the pension was commuted by the purchase by the company for 4994*l.* of an annuity for Mr. Bumsted's benefit in the Clerical, Medical and General Life Assurance Society to an equivalent amount. Income tax had been deducted from this annuity. The pension so long as it was paid was always treated by the company as a business expense and deducted from profits as

such, and this deduction had been allowed. When the annuity was purchased the company claimed to treat the 4994*l.* in the same way, but the surveyor disallowed the deduction. He relied to some extent on the form in which it was entered in the profit and loss account "capital cost of retiring allowance." He contended before the Commissioners that that entry described the real nature of the transaction, namely, as being an outlay of capital and as such an inadmissible deduction for income tax purposes, and he relied also on the decision of the House of Lords in *Royal Insurance Co.* v. *Watson*. (1) For the company it was contended that having regard to the scope of the company's undertaking and the nature of the payment it was properly chargeable as an ordinary business expense against revenue account, and reliance was placed on Lord Shand's speech in *Watson's* case. (1)

The second question was whether or not the 4994*l.* capital cost of retiring allowance was a proper deduction in arriving at the company's assessable profits.

Paragraph 10 of the special case was as follows :—" We the undersigned Commissioners differed in opinion on the question of the ' annuities in relation to taxed income ' " of the company, " but in all the circumstances decided in favour of " the company " on this point, holding (i) that under the provisions of s. 52 of the Act of 1842, the whole of the taxed dividends must be excluded in arriving at the profits assessable under Case 1, Schedule D, and (ii) that any question as to whether " the company " are liable under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, to account to the Revenue for the income tax deducted from the annuities does not come within the purview of and cannot be the subject of an appeal to the Income Tax Commissioners.

" On the point in dispute ' capital cost of retiring allowance ' we held, following the judgments of the Court of Appeal in the case of *Watson* v. *Royal Insurance Co.* (2) on November 19, 1895, which judgments although distinguished were not subsequently overruled by the House of Lords, the deduction to be inadmissible. We accordingly discharged the additional

(1) [1897] A. C. 1. (2) [1896] 1 Q. B. 41.

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first assessments for the three years ended April 5, 1913, and reduced the assessment for the year ended April 5, 1914, to the sum of £16,472*l.*

"The surveyor of taxes immediately upon the termination of the appeal gave notice of dissatisfaction with our decision on the first point 'annuities in relation to taxed income' as being erroneous in point of law, and" the company "adopted the same course with reference to our decision on the second point, 'capital cost of retiring allowance,' and in due course respectively required us to state a case for the opinion of the High Court, . . . which case we stated and do sign accordingly."

Sir Gordon Hewart S.-G. and *T. H. Parr* for the Crown. As to the first point, the company deduct the gross amounts of the annuities in order to arrive at their assessable profits; but when paying their annuitants they deduct income tax from the annuities and retain it for their own use. In this way they repay themselves pro tanto the tax deducted at the source from the income of their invested funds, and therefore they cannot deduct from their assessable profits the whole income of their invested funds, but only that portion from which the tax has been deducted without having been subsequently repaid; that is to say, the amount of the taxed dividends less the amount of the annuities. They claim that the annuities are payable out of their assets generally and are not charged upon any particular fund; but, as they have never accounted to the Crown for the tax deducted from the amounts of the annuities, they must be taken to have elected to pay the annuities out of the income of their invested funds.

Tomlin K.C. and *Latter* for the company. The annuities are properly deducted before arriving at the company's assessable profits. They are in the nature of expenses incurred in earning those profits: *Gresham Life Assurance Society* v. *Styles*. (1) The company are bound to deduct income tax from the annuitants: Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, because the annuities are "charged with income tax under Schedule D." The company are not bound to account to the Crown for the tax deducted because the annui-

(1) [1892] A. C. 309.

ties are not wholly payable out of profits or gains brought into charge to income tax: *London County Council* v. *Attorney-General* (1); *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2); *Sugden* v. *Leeds Corporation.* (3) The surveyor of taxes insists that the company must pay the annuities out of their taxed dividends; he forbids them to do that which the decision of the House of Lords permits them to do, namely, to pay the annuities out of their general assets: *Gresham Life Assurance Society* v. *Styles.* (4) He is demanding part of the tax twice over.

Sir Gordon Hewart S.-G. replied upon the first point.

On the second point

Tomlin K.C. and *Latter* for the company. The surveyor of taxes disallowed as one of the expenses of management the capital cost of Mr. Bumsted's retiring allowance, namely, a sum of 4994*l.* The Commissioners have affirmed that decision on the authority of *Watson* v. *Royal Insurance Co.* in the Court of Appeal. (5) The ratio decidendi of that case, that the sum in dispute, not having been expended as remuneration for services rendered in the trading year, was not expended for the purposes of the company's adventure, was not followed in *Royal Insurance Co.* v. *Watson* in the House of Lords (6), and is inconsistent with *Usher's Wiltshire Brewery* v. *Bruce* (7), *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (8), and *Ounsworth* v. *Vickers.* (9) The retiring allowance while it was paid annually was allowed as one of the expenses of management, and the mere act of paying it in advance cannot alter its character so as to make it a charge upon capital instead of upon revenue.

They were stopped.

Sir Gordon Hewart S.-G. and *T. H. Parr* for the Crown. It is a question of fact whether this sum of 4994*l.* is an expense out of capital or out of income. The surveyor of taxes has found that it is an expense out of capital. His finding must stand if there is any evidence to support it. This sum is not a recurring

(1) [1901] A. C. 26.
(2) [1910] A. C. 143.
(3) [1914] A. C. 483.
(4) [1892] A. C. 309.
(5) [1896] 1 Q. B. 41.
(6) [1897] A. C. 1.
(7) [1915] A. C. 433.
(8) [1914] 3 K. B. 674.
(9) [1915] 3 K. B. 267.

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expenditure, nor was it spent solely for the purpose of earning profits and gains. That which was an annual expense may become a capital expense if it is capitalized. If a company hold their business premises on lease, the rent is a revenue expense; if they acquire the fee simple, the purchase money is a capital expenditure. The test is whether the expenditure is made in order to meet a continuing business demand, or an expenditure incurred once for all: *Vallambrosa Rubber Co.* v. *Inland Revenue Commissioners* (1); *Ounsworth* v. *Vickers.* (2) If the Commissioners have not applied this test to the question the case should be sent back to them in order that they may do so.

Tomlin K.C. in reply. All the facts are found, and the Commissioners have dealt with this matter as a question of law. A capital expenditure must result in a capital asset.

Cur. adv. vult.

October 14. LUSH J. read the following judgment:—Two questions are raised in this case. In the first the Crown appeals against a decision of the Commissioners in favour of the company. In the second the company appeals against a decision in favour of the Crown. The first question arises in this way. The business carried on by the company consists of the purchasing or lending money upon reversions, etc., and the granting of annuities. Their income is derived from the falling in or the redemption of reversions, and the repayment of loans, &c., and from dividends on investments which are taxed at the source.

The company complained of four assessments made upon them for the years ending respectively April, 1911, April, 1912, April, 1913 and April, 1914, the first three being additional first assessments, and appealed to the Commissioners. Their complaint was this. In their statements of account they had, among other deductions, deducted from their profits the annuities which they paid as expenses incurred in their business. The sums so deducted were the gross sums, the income tax being deducted by them before paying the annuitants. Having arrived at the amount of their trading profits after taking those payments into account, and after making all

(1) (1910) S. C. 519. (2) [1915] 3 K. B. 267.

other necessary adjustments, they deducted from this sum their total taxed dividends, that is the total sum on which they had already paid income tax, and the difference they contended represented their assessable income. The annuities, it should be stated, were not charged on any particular fund, but were payable generally out of their assets.

The surveyor of taxes had objected to this, and in computing their liability to income tax he had subtracted from the taxed dividends the amount of the annuities which the company had paid, that is to say the gross amounts from which the company had themselves deducted the tax, allowing only the remaining balance of the taxed income as a deduction from the trading profits.

The question for the Commissioners was whether the surveyor of taxes was right or wrong in making this subtraction. Their decision, as I have said, was in favour of the company. It was given in these terms :—

[The learned Judge read paragraph 10 of the special case and proceeded.]

In order properly to understand the view taken by the Commissioners it is necessary to refer to two enactments. Sect. 52 of the Income Tax Act, 1842, is the section which imposes the obligation to make a statement as to the profits and gains of a business, &c., and prescribes the principle to be followed in making it. Sect. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, makes no reference to the statement or to the assessment. It relates to the payment of interest and annuities and the conditions on which income tax is to be deducted by the person who pays them. It enacts that " upon payment of any interest of money or annuities charged with income tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not

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paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty," &c.

The position, therefore, under that section is this. If a company which has to pay annuities as part of its business pays them out of untaxed profits, it has to deduct income tax and account for it to the Crown. If it pays them out of taxed dividends there is no such obligation. The view of the Commissioners seems to have been that as this section, s. 24, sub-s. 3, of the Act of 1888 is silent as to the mode in which the statement has to be made and as to the assessment, the question whether a company ought to account for income tax which it has in fact deducted from annuities, and whether it has properly deducted it, has no relation to any question of assessment and is not for the Commissioners to decide; it is a question which can only be raised in a proceeding by the Crown to recover the amount of the deducted tax. In my opinion this view is erroneous. It is essential in order to determine whether the amount of the profits or gains of a trader has been calculated on a correct basis to ascertain whether the proper deductions have been made, and for that purpose to ascertain out of what fund the annuities have been paid. If the tax has been deducted from them and not accounted for, that can have been lawfully done only if the annuities have been paid out of the taxed dividends. A trader who has not accounted for the tax but retained it for his own benefit cannot say, or cannot be heard to say, that he has done what the law prohibits, namely, paid the annuities out of his untaxed profits. He cannot assert a right to deduct the tax for his own benefit and at the same time assert that he has followed a method inconsistent with that right. This is what the company have done in this case. They have deducted the tax and they have asserted in their statement and before the Commissioners that they were entitled to retain it and have refused to account for it, and yet they contend that their untaxed profits must be diminished and not their taxed dividends, by the amount of the annuities. In other words they are availing themselves of their right to deduct the gross amount of the annuities from

their profits; that they had a perfect right to do; but when they come to calculate the sum on which they have already paid income tax, they deduct the whole of their taxed dividends without taking into consideration the fact that if their account is rightly made, those taxed dividends ought to have been diminished by the amount of the annuities paid out of them. The company have moreover credited themselves, in their method of accounting, with an expense they have never incurred. The only actual expense incurred so far as the annuities are concerned is the nett amount of the annuities, that is the annuities less tax. They have credited themselves with the gross amount.

Mr. Tomlin, who supported the company's contention by forcible arguments, contended that if you subtract the annuities from the taxed dividends you are depriving the company of their right to deduct the annuities. He pointed to the computation by the surveyor of taxes set out in the special case, and said that whereas he had allowed the deduction of the annuities from the profits at the beginning of the account, he had nullified it afterwards because he had subtracted the same figures from the taxed dividends when deducting them. This argument seems to me to ignore the purposes for which the two deductions are made. As was pointed out by the Solicitor-General, those purposes are quite different. The object of the first deduction is to deduct the expenses incurred in the business from the amount of the profits, a perfectly legitimate object. The object of the second deduction is to ascertain on what sum the company have already paid tax in order to arrive at the assessable income, again a perfectly legitimate object. But all that the surveyor has done in that second deduction is to ensure that the annuities were properly paid out of the right fund. The company are retaining the tax they deducted, which they are entitled to do if, and only if, the method adopted by the surveyor is followed.

I do not propose to examine the cases which were cited to me. It is sufficient to say that not one of them supports the company's contention that the deducted tax can be retained when the annuities are deducted from the untaxed profits.

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The contention of the Crown is in my opinion the right one, and I must therefore on this first question allow the appeal.

The second question is this :—

[The learned Judge then stated the facts relating to Mr. Bumsted's annuity as set out above, and continued.]

The view of the surveyor as to the decision of the House of Lords in *Watson's Case* (1), supporting his contention that the deduction was inadmissible, is in my opinion clearly wrong. The facts upon which it was held in that case that the deduction was inadmissible are entirely different, and the decision has no application to the present case. I disagree also with the view of the Commissioners as to the decision of the Court of Appeal compelling them to decide as they did. In *Watson's Case* (2) the company took over the business of another insurance company, and it was a term of the agreement that they should take the manager of that other company into their service at his existing salary with power to commute such annual payment by payment of a certain gross sum. They took him into their service but subsequently dismissed him, paying him the agreed sum. The question was whether the gross sum so paid could properly be deducted as a business expense. The Court of Appeal held that it could not, on the ground that money so expended not being expended as remuneration for services rendered, could not be treated as money expended for purposes of the trade or business. The decision was affirmed in the House of Lords, but on an entirely different ground. The ground there was that the bargain between the parties necessarily involved the expenditure which was part of the consideration for the transfer of the business ; "part of the purchase money for the concern," as Lord Halsbury said (3), and that therefore it was a capital expenditure. Having regard to that decision and to the observations of the learned Law Lords, particularly Lord Shand, it is impossible to regard the decision of the Court of Appeal as a binding authority in support of the view that unless money is expended as remuneration for services rendered in the trading year it cannot be an expense incurred for the purposes of the trade.

(1) [1897] A. C. 1.

(2) [1896] 1 Q. B. 41; [1897] A. C. 1.

(3) [1897] A. C. 7.

I do not think that the Court of Appeal intended to lay down such a proposition as of universal application; the Court was dealing with the facts of that particular case. The contrary principle has frequently been acted on. The facts in *Usher's Wiltshire Brewery* v. *Bruce* (1) are no doubt very different from those in the present case, but the decision and the grounds on which it was based appear to me to be inconsistent with any such view. In *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (2), Scrutton J. held that the Commissioners were justified in treating a lump sum of 1500*l.* paid to a gentleman on their staff of law reporters on his retirement as an expense incurred in the business carried on and as such an admissible deduction. In *Ounsworth* v. *Vickers* (3) Rowlatt J., following a judgment of the Lord President in *Vallambrosa Rubber Co.* v. *Inland Revenue Commissioners* (4), said that the proper test to apply is this: Was the expenditure incurred in order to meet a continuing business demand, in which case it should be treated as an ordinary business expense and an admissible deduction, or was it an expenditure incurred once for all, in which case it should be treated as a capital outlay. I agree with that view, and applying that test I think that it necessarily follows, on the facts found by the Commissioners, that the 4994*l.* should be treated, as the pension was treated, as an ordinary business expense and that the deduction should be allowed. It is the pension in another form; it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was itself an ordinary business expense as the surveyor had treated it. It was no part of the bargain between the two companies that it should be paid, as in *Watson's Case.* (5) It was paid, as the Commissioners state, "entirely as a matter of domestic arrangement." It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure as it would be to hold that, if an employer made a voluntary arrangement with

(1) [1915] A. C. 433.
(2) [1914] 3 K. B. 674.
(3) [1915] 3 K. B. 267.
(4) 1910 S. C. 519.
(5) [1897] A. C. 1.

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his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay.

I was asked to say that the question is one of fact for the Commissioners to decide, and that as they had not decided it I must at least send the case back. Reference was made to what Scrutton J. said as to that in *Smith* v. *Incorporated Council of Law Reporting for England and Wales.* (1) But here the surveyor of taxes has dealt with the pension as a question of fact and treated it as an admissible deduction, and his view as to that was not in controversy. It is no doubt a question of fact whether a retiring allowance, whatever form it takes, is an expense incurred for the purpose of earning profits, but that question has been disposed of in the company's favour. The Commissioners have found all the facts, and in my opinion only one conclusion can be drawn from them, namely, that the 4994*l.* was an expense incurred in the business not in the nature of a capital expenditure and that it was an admissible deduction. The Commissioners, I think, came to a different conclusion only on the supposed authority of the decision in *Watson's Case* when in the Court of Appeal. (2)

I would add that with regard to the form of the entry, "Capital cost of retiring allowance," I do not see how it is relevant. The 4994*l.* was no doubt a capital cost in the sense that it was a capitalized payment. The expression had no relation to the question whether the expenditure was a capital expenditure for the purpose of income tax adjustment. I must for these reasons allow the company's appeal on this second question.

Appeal allowed on both points.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for the Company: *Peacock & Goddard.*

W. H. G.

(1) [1914] 3 K. B. 674. (2) [1896] 1 Q. B. 41.

[IN THE COURT OF APPEAL.]

C. A. 1918 October 25.

RUSSIAN BANK OF FOREIGN TRADE *v.* EXCESS INSURANCE COMPANY, LIMITED.

[1916. R. 828.]

The judgment below affirmed on a different ground, the Court holding that there was no abandonment and not deciding the other points.

APPEAL from the judgment of Bailhache J., reported [1918] 2 K. B. 123.

The facts are stated fully in the report of the case in the court below. The view of the case taken in this court makes it unnecessary to repeat them further than to state that the plaintiffs insured with the defendants certain barley on board the steamship *Wolverton* at Novorossisk for carriage to Falmouth. The policy of insurance included loss from restraints of princes and consequences of hostilities, but excluded claims due to delay. Owing to the closing of the Dardanelles the ship could not leave Novorossisk, and while she was there on March 5, 1915, her owners were directed by the Lords Commissioners of the Admiralty to place her at the disposal of the Russian Government. Thereupon the plaintiffs telegraphed to their insurance brokers on March 5: "*Wolverton* requisitioned by British Government account Russian Government. Impossible reload barley. Consider case covered by war risk. Agreeable release underwriters from all risks if underwriters will pay difference between present value in Novorossisk and insured value."

The plaintiffs claimed for a constructive total loss of the barley.

BAILHACHE J. held (1.) that the telegram of March 5 was a good notice of abandonment; (2.) that the requisition by the Admiralty was ultra vires, and therefore not a restraint of princes; (3.) that the closing of the Dardanelles was a restraint of princes; but (4.) that the claim was a claim

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due to delay, and therefore excluded by the policy. He therefore gave judgment for the defendants.

The plaintiffs appealed.

R. A. Wright K.C. and *Le Quesne* for the appellants.

MacKinnon K.C. and *Simey* for the respondents.

In view of the questions raised in the Court below touching the prerogative of the Crown and the validity of the requisition by the Lords of the Admiralty directing the appellants to place their steamship at the disposal of the Russian Government,

Sir Frederick Smith A.-G., *Sir Gordon Hewart S.-G.*, *Ricketts* and *Dunlop* appeared on behalf of the Crown, and were prepared, if necessary, to vindicate the requisition as an exercise of the prerogative.

THE COURT (Bankes, Warrington, and Scrutton L.JJ.) expressed the view that it was unnecessary to decide this question. Thereupon counsel for the Crown withdrew, and the Court, after reviewing the correspondence and the evidence given at the trial, decided that the telegram of March 5, 1915, from the appellants to their insurance brokers was not intended, or taken, as a notice of abandonment, but as an offer of a compromise; that no timely notice of abandonment had been given, and consequently that the appellants could not recover. Upon the other points raised before Bailhache J. the Court preferred to express no opinion. In particular, as to the question whether a requisition by the Admiralty, assuming it to be ultra vires, might fall within the words "restraint of princes," Scrutton L.J., without expressing a final opinion, inclined to the view that it well might.

In the result the appeal was dismissed.

Solicitors for appellants: *Botterell & Roche.*

Solicitors for respondents: *William A. Crump & Son.*

Solicitor for the Crown: *The Treasury Solicitor.*

W. H. G.

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October 17.

County Court—Wrongful Detention of Chattel—Judgment for Return of Chattel or Payment of Value—Default of Defendant—Power of Court to issue Warrant of Delivery—County Court Rules, Ord. 25, *r.* 69—*County Court Forms, Form* 295.

Where in an action in a County Court for the return of a chattel wrongfully detained the Court gives judgment for the plaintiff and thereby orders the defendant to return it or to pay its value within a specified time, in the event of the defendant failing to comply with the order within the time limited, the Court may under Ord. 25, r. 69, issue a warrant of delivery without giving the defendant any further option of paying the value. The power to do so is not confined to a case in which the original order was for the return of the chattel simpliciter without any option to the defendant of retaining it upon payment of the value.

APPEAL from the Plymouth County Court.

The action was for the return of a sewing machine belonging to the plaintiff and wrongfully detained by the defendant. The judge gave judgment for the plaintiff, and by his judgment, which was in the terms of Form 292 of the County Court Forms, he ordered the defendant to return the machine to the plaintiff or pay the sum of 6*l.* 10*s.*, its value, on or before February 18, 1918. The defendant failed either to return the machine or pay its assessed value, and on March 15 the judge, on the plaintiff's application, made an order that a warrant of delivery should issue. The defendant appealed on the ground that the judge had no jurisdiction to make that order.

Dale for the defendant. Where a judge in an action of detinue finds for the plaintiff he may either make an order in the alternative, that the defendant shall return the goods *or* pay their value before a certain date; or he may make an order that the defendant shall return the goods before a certain date, without any option of paying their value, and that in default of his so returning it a warrant of delivery shall issue. Form 292 makes provision for both those two forms of judgment. Order 25, r. 69, of the County Court

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Rules which authorizes the issue of a warrant of delivery does so only when the judgment is in the latter form. It says that "Where a judgment or order is for the recovery of any property other than land or money, the Court may, upon the application of the plaintiff, order in default of delivery that a warrant shall issue for the delivery of the property, without giving the defendant the option of retaining the same upon payment of the value assessed." That rule has no application to a case where the judgment is in the alternative for the return of the goods or the payment of their value. In such a case, although the defendant may make default in complying with the judgment, his option still remains, and the plaintiff's only remedies are by execution for the value or by attachment of the defendant.

Dummett for the plaintiff. The Court has power under Ord. 25, r. 69, to issue a warrant of delivery whenever the defendant is in default. That rule expressly takes away the option of the defendant upon his failure to comply with the judgment. In the present case the warrant of delivery when drawn up will be in Form 295, which after reciting that an order has been made in the alternative for the return of the goods claimed or for the payment of —*l.* (their value) and that the defendant has not returned the goods, and has made default in payment as ordered, directs the high bailiff to seize the goods so not returned, and to deliver them to the plaintiff. That exactly meets this case.

Dale in reply.

ROWLATT J. In this case the action was brought for the return of a sewing machine wrongfully detained. The judge found for the plaintiff and ordered the defendant to return it or pay 6*l.* 10*s.*, its value, within a specified time. The defendant having failed to comply with that order, the judge ordered that a warrant of delivery should issue. The question is whether he had power to make that order having regard to the form of the judgment. It was contended that to make such an order would be to vary the terms of the judgment. But the issue of a warrant of delivery is merely a mode of execution, and it is not necessary that the execution

should follow the letter of the judgment. Before the Common Law Procedure Act, 1854, where an action was brought for the wrongful detention of a chattel, the form of the judgment, if for the plaintiff, was that "the said A. B. do recover against the said C. D. the goods and chattels aforesaid or the said sum of —*l.* for the value of the same," and the Common Law Courts had no power to compel the defendant to adopt the alternative of returning the goods. The defendant could always satisfy the judgment by paying the assessed value. By s. 78 of the Act of 1854, a new form of execution of that judgment was introduced, the Court being empowered to "order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed." But the form of the judgment remained as before in the alternative, giving the defendant an option of paying the value, so that the form of execution did not necessarily follow the judgment. And the form of the judgment still remains the same both in the High Court and in the County Court. Ord. 25, r. 69, of the County Court Rules is in substantially the same terms as s. 78 of the Common Law Procedure Act, 1854, and as it was treated as no objection that the execution did not follow the judgment in the High Court, neither can it be in the County Court. The defendant's objection to the issue of the warrant of delivery therefore fails, and the appeal must be dismissed.

McCARDIE J. I agree. It was said on behalf of the defendant that the judge had no power to order the issue of a warrant of delivery because of the wording of Ord. 25, r. 69, which rule, it was contended, only applied to a case in which the original judgment was for the return of the chattel without any alternative option to the defendant of paying the value. To my mind that is too narrow a construction to put upon the rule. A judgment is not the less a judgment for the recovery of a chattel because it gives the defendant up to a certain date the option of returning it or paying its value. That the Court has power under that rule to order a warrant of delivery in a case in which, the judgment

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having given the defendant that option, he has failed to comply with either alternative, seems quite clear from Form 295. That Form is based on the assumption that the Court has that power. Here the defendant was in default, and under those circumstances the judge had jurisdiction to make the order which he did.

Appeal dismissed.

Solicitors for defendant : *Law & Worssam* for *Elliott, Square & Geake, Plymouth.*

Solicitors for plaintiff : *Eric N. Ward, Plymouth.*

J. F. C.

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October 17.

DAVID *v.* METROPOLITAN WATER BOARD.

Metropolitan Water—Defect in Communication Pipe—Escape of Water—Ground opened by Board to ascertain Source of Leakage—Liability of Owner for Expense—"Repairs"—Metropolitan Water Board (Various Powers) Act, 1907 (7 *Edw.* 7, *c. clxxiv.*), *s.* 71.

By s. 71 of the Metropolitan Water Board (Various Powers) Act, 1907, "If it should appear to the Board that by reason of any injury to or defect in any communication pipe any waste of water or injury or risk of injury to person or property is caused or likely to be caused it shall be lawful for the Board to execute such repairs as they may think necessary or expedient in the circumstances of the case without being requested so to do, and the expense incurred by the Board in executing such repairs shall be recoverable by the Board as the water rates in respect of the premises are recoverable."

Held, that the work of repair, for the expenses of which the owner of a defective communication pipe is liable under the section, is limited to work done after the Board have ascertained that it is from his pipe that the leakage of water comes, and does not include an exploratory opening of the ground for the purpose of locating the source of the leakage.

APPEAL from the Westminster County Court.

The defendant, A. T. David, was the owner and occupier of a house, No. 525, Finchley Road, Hampstead. In January, 1917, there was a considerable leakage of water from underground in the said road. A large area of the road surface was flooded by the escaped water, and the Metropolitan Water Board, not knowing whether the leakage was in one of the communication

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pipes of the houses in the road or in their own main, opened the ground at various points in the roadway in order to locate it. They eventually found that the water escaped from a defective communication pipe belonging to the defendant. They then gave him notice to repair the pipe. He immediately complied with the notice and caused the repairs to be executed. They claimed from him under s. 71 of the Metropolitan Water Board (Various Powers) Act, 1907, the sum of 4*l.* 6*s.* 6*d.*, the cost of opening the roadway, as being "repairs" necessitated by the defect in his pipe. The deputy county court judge found that the work was necessary for the purpose of locating the leakage, but that it would not have been necessary for the actual repair of the leak if the situation of the leak had been known. He, however, held that the work of locating the leak, being a necessary incident of the work of repairing it, was "repairs" within the meaning of the section. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

Macmorran K.C. and *C. M. Knowles* for the appellant. The expense incurred by the Board was the result of an exploration for the purpose of discovering where the leak was. That expense they are not entitled to charge to the appellant. They could not under any statute have required him to explore to see if he was the party responsible, and under the section under which they claimed their right of recovery against the owner in default is limited to the cost of repairs. Before any liability of the owner under that section begins it must "appear to the Board" that waste or injury is likely to be caused by a defect in his communication pipe—that is to say, they must know that the offending pipe is his pipe; and here they did not know it until after the expense in question had been incurred. That expense was incurred for the purpose of ascertaining whether they had a right to proceed under s. 71 or not. Where, as here, the area flooded by the escaped water is large, the Board may have to take up half a street in order to find the source of the leak, but they could not in such a case charge the expense to the owner of the particular pipe.

Holman Gregory K.C. and *Goodland* for the respondents.

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By s. 28 of the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), the owner or occupier of premises shall provide the prescribed "fittings," which term by s. 3 includes communication pipes, "and shall from time to time keep the same in proper repair." The appellant, therefore, was bound to keep this communication pipe in a state of good repair, and for that purpose power was given to him under s. 19 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), to break up the road. If, therefore, the Board had suspected that the leakage came from the appellant's pipe and given him notice to repair it, he clearly would have had to pay for the cost of excavation, and it can make no difference that they did that portion of the work themselves. Before a leak can be repaired its situation must be ascertained, and the work of ascertaining it is a necessary part of the repairs. If, as suggested, the Board, in order to locate a leak, have to open up half a street there is nothing unjust in charging the whole expense to the owner in default, for it is the necessary consequence of his pipe being out of repair.

Macmorran K.C. in reply.

ROWLATT J. This is an appeal from the decision of the deputy county court judge at Westminster in an action in which the Metropolitan Water Board sought to recover from the owner of a communication pipe the sum of 4*l.* 6*s.* 6*d.* as being the expense of opening the ground in a road and locating the leakage of water from that pipe, and the question is whether the Board can recover those expenses of exploratory operations conducted for the purpose of ascertaining where the leak was. The case was rested upon s. 71 of the Metropolitan Water Board (Various Powers), Act, 1907, which provides that "If it should appear to the Board that by reason of any injury to or defect in any communication pipe any waste of water or injury or risk of injury to person or property is caused or likely to be caused," they may do such repairs as they think necessary and charge the owner for them. Mr. Macmorran has pointed out to us that this is a section in an Act promoted by the Water Board imposing liabilities upon individuals who were not heard

when the bill was before Parliament; and under those circumstances it has always been the principle that you must scrutinise the words conferring powers upon the promoters with care and exactness, and must not give any further effect to the statute than what is expressed. Now the section begins with the words "If it should appear to the Board," and it seems to me quite clear that the powers conferred upon them cannot arise until after it has appeared to the Board that the conditions exist upon which the powers are exercisable—that is to say, until after they have made up their mind that the defective communication pipe is the pipe of the person whom they seek to charge. It is enough if they guess that it is his pipe, provided they guess right, but they must have made up their mind upon the matter, and until they have done so they have no powers under the section. In this case it did not "appear to the Board" that the offending pipe belonged to the appellant until after the work for which they seek to charge him had been done. Therefore the section does not help them. It might perhaps have been reasonable for the Legislature to have enacted that where an exploratory operation is necessary for the purpose of locating a leak the person whose pipe turns out to be the cause of the damage should pay for the exploration. But however reasonable that might be, it is not what the section has said. And apart from the section I see no way in which the Board could recover this expense. Therefore I think the appeal must succeed. I wish, however, to guard myself against a possible misunderstanding. The particulars of claim state the sum claimed to be "expenses of opening the ground when locating leakage to communication pipe and the expense of the subsequent reinstatement of the roadway," and it may be that some small portion of the expense incurred was in connection with the reinstatement of the portion of the roadway immediately above the appellant's communication pipe. But the deputy county court judge paid no particular attention to that portion of the work, and the parties treated the case as though the whole of the expenses sued for were attributable to the opening of the ground. I must not be understood as deciding

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that in such a case as this the appellant would not have been chargeable with the cost of filling up the hole and reinstating that portion of the surface after the leak had been found to be in his pipe. I give no decision upon that matter.

McCARDIE J. I agree. Sec. 71 of this Act gives a novel right to the Metropolitan Water Board in that it enables them to act without notice against the property of a private individual and incur expenses which may be chargeable against him. It is in striking contrast with s. 29 of the Act of 1871, which provided that the undertakers might cause the defective pipe to be repaired after notice had been given to the owner to do the work himself and he had failed to comply. In view, therefore, of the particular nature of the rights given to the Board as against a private individual I conceive that the rule of construction suggested by Mr. Macmorran should be applied—namely, that no greater effect should be given to the section than is actually required by its wording. [He read the section.] It seems to me that that section has been so worded as to afford a distinct protection to the owner of the communication pipe, the protection being this, that before the Board can proceed in such a way as to enable them to charge the owner with the expense they must be satisfied in their own mind that there is a defect in his communication pipe. The result is that the Board are unable to charge the owner of the pipe subsequently found to be defective with the expense of work of a preliminary or investigatory character, which is required not in order to ascertain the point at which the defect exists in a specific communication pipe, but to ascertain whether the defect exists in the communication pipe of the person sought to be charged, or in the communication pipe of some other person, or in the Board's own main; in other words, the expenses of investigatory work for the purpose of seeing whether the defendant's communication pipe is in fault cannot be recovered. And the case in the County Court was conducted on the footing that it was only the expense of that investigatory or exploratory work that was sought to be recovered. Under these circumstances I am of opinion that this appeal must succeed. But I desire

to add that I am not prepared to decide that the Board are unable to recover the expenses of restoring the road, so far as that restoration is limited to the portion of the road above the defective communication pipe. *Appeal allowed.*

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Solicitors for the appellant: *W. H. Martin & Co.*
Solicitor for the Water Board: *Walter Moon.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

PYMAN STEAMSHIP COMPANY *v.* LORDS COMMISSIONERS OF THE ADMIRALTY.

1918 *October* 31.

Shipping—Charterparty—Owners take Marine Risks—Charterers take War Risks—Danger from both Risks—Salvage—Apportionment of Salvage Reward.

The Lords Commissioners of the Admiralty requisitioned a steamship upon the terms of a charterparty, which provided that they should not be liable for any cause arising as a sea risk, but that the risks of war which were taken by them were those excluded by the following clause:—"Warranted free of capture, seizure, and detention, and the consequences thereof . . . . and also from all consequences of hostilities or warlike operations." On a voyage in the North Sea under this charter, while she was between two minefields, the vessel broke her propeller shaft in a gale of wind, and was being driven disabled towards one of the minefields six miles distant. Salvage services were rendered, and she was eventually towed into port. The owners paid one sum of 3000*l.*, admittedly a fair sum, in settlement of a claim for salvage. The question whether the Admiralty should contribute towards this sum was referred to arbitration. The arbitrator found that the vessel, besides being exposed to ordinary sea perils, was in danger of drifting on to a minefield; that the master accepted the salvage services to save the ship from both marine and war risks, the consequences of hostilities and warlike operations within the meaning of the charterparty; that 750*l.* out of the 3000*l.* represented the sum by which the salvage reward was enhanced by reason of war risks, and that 750*l.* was a reasonable sum for the owners to have paid for rescuing their vessel from those risks. He awarded that the Admiralty, as charterers, were liable to pay that sum.

Held, that the 750*l.*, being the amount of salvage occasioned by the consequences of hostilities or warlike operations, was a loss from those causes, and payable as such by the Admiralty within the express terms of the charter.

Aitchison v. *Lohre* (1879) 4 App. Cas. 755 followed.

Judgment of Bailhache J. [1918] 1 K. B. 480 affirmed.

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APPEAL from the decision of Bailhache J., reported [1918] 1 K. B. 480, upon a question raised in an award in the form of a special case, which stated the following facts:—On February 15, 1915, the steamship *Raithwaite*, belonging to the Pyman Steamship Company (hereinafter called "the owners"), was requisitioned by the Admiralty upon the terms contained in Charter T. 99. Clause 18 provided: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by, or in consequence of, dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury. . . ."

On February 17, 1915, the *Raithwaite* broke her intermediate propeller shaft whilst on a voyage from Rotterdam to the Tyne in ballast, and was thereby disabled. At that time a gale was blowing from the S.S.W., and the vessel was in a position between two minefields, being driven by the wind, tide, and sea towards certain German minefields which were about six miles north of where she was. Efforts were unsuccessfully made to repair the shaft, and during that time a submarine, supposed to be German, passed about one mile to the north, but took no notice. At about 11 a.m. on February 18 the *Caledonia*, a steamship belonging to the Netherlands, hove in sight, and steered towards the *Raithwaite*, and her captain verbally agreed to take the *Raithwaite* in tow and bring her, if possible, to a safe port or anchorage in England. Many hours were spent before the vessels could

get into connection, during which time a buoyant mine drifted towards them and passed about 20 yards from the stern of the *Raithwaite*. At about 6 p.m. they managed to get connected, and the *Caledonia* endeavoured to tow the *Raithwaite* in a south-westerly direction; but as both vessels were only drifting towards the German minefields a course was shaped towards the Dutch coast, the wind and sea both increasing rapidly until a gale was blowing, with squalls, and heavy sea. At 3.30 a.m. on February 19 they took a pilot on board from the Hook of Holland. Then the captain of the *Caledonia*, finding that he could not handle the vessel in such weather in the river waited for daylight, and then sent ashore for a tug. The tug *Louwerzee* came to his call, and with her help he towed the *Raithwaite* to Rotterdam, arriving there at 2 p.m.

On June 21 the master and owners of the *Caledonia* brought an action in Rotterdam against the owners for salvage. The owners, with the approval of their underwriters, paid the salvors in settlement of their claim the sum of 3000*l.*, which sum was admitted by the Admiralty to be a reasonable amount. The owners claimed that this sum of 3000*l.* should be paid in equal moieties by their underwriters and the Admiralty, as both the salved and the salving vessels were in more than ordinary danger owing to the risk of minefields during the performance of the salvage services. The Admiralty contended that they were not liable for any portion of the sum paid in respect of salvage services, as the vessel had not been actually injured by a war risk. By agreement the question whether the salvage should be divided, as contended by the owners, was referred to arbitration.

The arbitrator found the following facts:—That the *Raithwaite* as she lay at anchor disabled, besides being exposed to the ordinary sea perils, was in danger of driving on to one or other of the minefields if her anchors failed to hold; that the danger from drifting mines and enemy submarines was accentuated by the fact that the *Raithwaite*, being unable to steam, was compelled to remain in a danger zone, offering an easy target for the enemy, until she was towed into safety

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by the salvors; that 750*l.* out of the total sum of 3000*l.* paid for salvage might properly be treated as representing the amount by which the salvage reward payable to the salvors was enhanced or increased by reason of war risks to which the salved vessel was exposed, and from which she was rescued by the salvors; that the master of the *Raithwaite*, in accepting the services of the salvors, did so with the object of saving his vessel both from marine and war risks; that 750*l.* was a reasonable sum for the owners to have paid for rescuing the vessel from such war risks; and that those war risks were "consequences of hostilities and warlike operations" within clause 19 of Charter T. 99.

Subject to the opinion of the Court, the arbitrator awarded that the Admiralty, as charterers, were under a liability to the owners to pay to them the sum of 750*l.* as being a reasonable sum incurred and paid by the owners for the purposes of safeguarding the vessel from loss or injuries from war risks which were reasonably apprehended.

The question for the opinion of the Court was whether the award was right.

Bailhache J. upheld the award.

The Lords Commissioners of the Admiralty appealed.

Sir Gordon Hewart S.-G. and *Dunlop* for the appellants. If this was an action by the respondents on a policy of marine insurance their underwriters would be liable for the whole amount of the salvage—namely, 3000*l.* What made the salvage services necessary was the breaking of the propeller shaft, leaving the ship at the mercy of wind and waves. This was a marine risk. It matters not that by the accident of time and place that risk was complicated by the proximity of mines and submarines. If the vessel had struck a mine the risk would still have been a marine risk and not a war risk, because the origin of the evil, the breaking of the shaft, was a marine risk pure and simple.

[SCRUTTON L.J. referred to *Aitchison* v. *Lohre*. (1)]

The mere fact that one person benefits by the expenditure of another imposes no obligation on the person benefited to

(1) 4 App. Cas. 755.

contribute towards the expense: *Ruabon Steamship Co.* v. *London Assurance.* (1) The liability of the appellants depends upon whether, if this had been an action against marine underwriters, they could have pleaded that their liability was excluded by a free of capture and seizure clause in the terms of clause 19. In that case the underwriters could not have relied on the free of capture and seizure clause, and there would have been no defence to the action. Only when the marine underwriters' liability is excluded by that clause does the liability of the appellants commence. A salvage award is one lump sum, and indivisible. It varies according as there are, or are not, lives on board the salved vessel.

R. A. Wright K.C. and *Stranger*, for the respondents, were not called upon.

BANKES L.J. I agree with the decision of Bailhache J and with the reasons on which he based it. Mr. Dunlop argued that the true basis on which to rest this case was to treat it as an action against marine underwriters. I do not agree. Then he contended that a salvage award is in its nature indivisible. Again I do not agree. The amount of a salvage award ought to depend to some extent on the degree of danger to which the property is exposed. In the case of a single danger the award may be indivisible, but if the property is exposed to several dangers at once I see no reason why the award should not be divisible or why the person who is called upon to fix the amount should not be asked to apportion his award. Such a person might well say: "I find that this vessel was exposed to two different kinds of danger—one from perils of the sea, and the other from war risks. If she had encountered perils of the sea only I should have awarded 2250*l.*, but as she was exposed to war risks also, I award 750*l.* in addition to the 2250*l.*" In the present case the parties, to all intents and purposes, asked the arbitrator to do what they might have done themselves. The arbitrator has found that the amount paid for salvage services—namely, 3000*l.*—was enhanced or increased by 750*l.* by reason of the

(1) [1900] A. C. 6.

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war risks to which the salved vessel was exposed, and from which she was rescued by the salvors; that is, in addition to the original sea peril. In such circumstances the question, What was the causa proxima? does not arise. The liability of the appellants under clause 19 of Charter T. 99 is clear. It is not a question of any implied contract. In the words of Lord Blackburn in *Aitchison* v. *Lohre* (1) "The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril." Their liability is therefore covered by the express terms of their charter. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. This vessel was exposed after breaking her propeller shaft to risks from two causes. She might have been further injured by perils of wind and sea. But she was exposed to a special war risk arising from her position; she was in danger of drifting on to a German minefield. It is clear from clause 19 of the charter that the appellants took the risk of injury from such a cause as this. The ship was salved, and so withdrawn not only from the marine but also from the war risk, and beyond doubt the difficulty of salvage was greatly increased by the presence of the latter. Payments made to avert a peril may be recovered as a loss by the peril. The arbitrator has been invited by the parties to say what part of the gross sum of 3000*l.* was awarded in respect of averting injury from war risks. He says 750*l.* was so awarded. If that sum was incurred to avert actual injury it was one of the risks taken by the appellants.

SCRUTTON L.J. I agree. I have listened with attention to the argument of counsel for the appellants. Having given it my best consideration I think this is a clear case. First let me say what this case is not. It is not a salvage action in personam against the appellants. If it were, the decision in the *Cargo ex Port Victor* (2) following that of Sir James Hannen in the *Five Steel Barges* (3) would require careful consideration. Neither is it a claim against underwriters of

(1) 4 App. Cas. 755, 765. (2) [1901] P. 243.
(3) (1890) 15 P. D. 142.

marine or war risks for the whole amount with a defence by the underwriters that they are liable for a part only. It might be hard to prove the facts necessary to support that defence, but if they were proved I see nothing to preclude it. I will now say what this case is. It is simply a claim on a contract, not an implied but an express contract, to be read, be it remembered, as a mercantile document. [The Lord Justice read clauses 18 and 19 of Charter T. 99, and proceeded.] Ever since the decision in *Aitchison* v. *Lohre* (1), and long before that, it has been a commonplace in mercantile law that sums paid to avert a peril may be recovered as upon a loss by that peril, and as soon as it is established that this sum of 3000*l.* was paid partly to avert a sea peril and partly to avert a peril from enemy mines it follows that there has been one loss by sea perils and another by war perils. The parties have agreed that the appellants shall not be liable for loss by sea perils, and shall be liable for loss by war perils. The decision of Bailhache J. was therefore right, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *The Treasury Solicitor.*

Solicitors for respondents: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

(1) 4 App. Cas. 755.

W H G

1918
October 21.

VIGERS BROTHERS *v.* LONDON COUNTY COUNCIL.

Metropolis—Sewer—Obstruction or Encroachment upon or over—Licence—Stack of Timber—Offence of Trivial Nature—Metropolis Management Amendment Act, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 68—*Probation of Offenders Act*, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1.

By s. 68 of the Metropolis Management Amendment Act, 1862, "Every person who shall knowingly erect or place any . . . . obstruction . . . . or encroachment in, upon, over, or under any sewer under the jurisdiction of the Metropolitan Board of Works . . . . without the previous consent in writing of the board or vestry in whom the same may be vested" shall be liable to a penalty.

The London County Council in 1912 constructed a sewer for the drainage of the Metropolis, the sewer being situated at a depth of 26 feet under a certain wharf and adjacent land which were subsequently acquired by Vigers Bros., who stacked timber on the land over the sewer. The Council required Vigers Bros. to take out a licence from them under s. 68 of the Act of 1862, but Vigers Bros. declined to do so, as the Council demanded a rent of 10*l.* a year. The Council then took proceedings against Vigers Bros. under s. 68 for having placed an obstruction over the sewer without the previous consent in writing of the Council. It was admitted that the sewer was not endangered by the stacks of timber, and that the stacks could be removed in half a day if access to the sewer was required.

Held, (1.) that the stacks of timber constituted an obstruction or encroachment upon or over the sewer within the meaning of s. 68 of the Metropolis Management Amendment Act, 1862; but (2.) that there were grounds upon which the magistrate could find that the offence was trivial in nature within the meaning of s. 1 of the Probation of Offenders Act, 1907.

CASE stated by a Metropolitan police magistrate.

Vigers Bros., who were timber merchants carrying on business at Deptford Creek, were summoned, on the complaint of the London County Council, under s. 68 of the Metropolis Management Amendment Act, 1862, (1) for having unlawfully

(1) Metropolis Management Amendment Act, 1862, s. 68: "Every person who shall knowingly erect or place any building, wall, bridge, fence, obstruction, annoyance, or encroachment in, upon, over, or under any sewer under the jurisdiction of the Metropolitan Board of Works, or of any vestry or district board, and every person obstructing, filling in, or diverting any sewer or drain under the jurisdiction, survey, or control of the Metropolitan Board, or of any vestry or district board, without the previous consent in writing of the board or vestry in whom the same may be vested, shall, in addition to any other proceeding

and knowingly placed an obstruction, (1) to wit, timber stacks about 16 feet, 30 feet, and 60 feet long respectively, over a sewer under the jurisdiction of the London County Council, namely, the Southern Low Level Sewer No. 2, without the previous consent in writing of the Council; and, as regards a timber stack 60 feet long, with having continued the offence.

At the hearing of the three summonses, on February 7, 16, and March 9, 1918, the following facts were proved or admitted.

The London County Council, under the provisions of 18 & 19 Vict. c. 120, s. 135, in 1912 constructed a sewer for the drainage of the Metropolis, the sewer being situated at a depth of 26 feet under a certain wharf and land.

Vigers Bros. acquired the freehold of the land and wharf in the year 1916. The land was used by them as a timber yard and saw-mill, and timber was brought alongside the wharf by barges in the Deptford Creek. The timber was unloaded by means of a crane, and was stacked on various parts of their land until sawn and/or removed after sale. Vigers Bros. had constructed the saw-mills for the purpose of cutting up some of the timber so landed.

The London County Council, being of opinion that the timber stacked on the land of Vigers Bros. constituted an obstruction over and on the sewer, required Vigers Bros. to take a licence from them under s. 68 of the Act of 1862. As Vigers Bros. declined to take up the Council's licence, on the ground that they objected to pay the rent of 10*l.* a year demanded by the London County Council, the Council served upon Vigers Bros. a notice to remove the stacks of timber over the sewer.

Vigers Bros. not having removed the stacks of timber,

to which he may be liable therefor, forfeit and pay to such respective board or vestry a sum not exceeding twenty pounds for every such offence; and the board or vestry may demolish and remove any such . . . . obstruction, annoyance, or encroachment . . . .; and in case of a continuing offence in any of the cases aforesaid the offender shall be liable to a further penalty . . ."

(1) The conviction was for having placed an encroachment upon or over the sewer, but the Court held that the magistrate must be taken to have amended the information.

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the London County Council laid an information against them, alleging that they had committed an offence under s. 68 of the Metropolis Management Amendment Act, 1862, as they had stacked and maintained the timber without a licence in writing granted by the London County Council.

The timber stacks had been stacked there in December, 1916, and were removed from time to time as required. The stack 60 feet in length was some few feet in height. Close to the mills, and against the boundary fence, logs were temporarily placed on the ground ready to be sawn up at the mills.

It was admitted on behalf of Vigers Bros. that the timber referred to in the preceding paragraphs was on ground which as to 10 feet in width was over the sewer, and which sewer was about 26 feet below the surface of the soil. The only mark which indicated the position of the sewer was an arrow mark on a building at the west end of the land of Vigers Bros.

It was admitted on behalf of the London County Council that their sewer was not in any way endangered by the stacks of timber complained of, and that if they required to open up the ground in order to obtain access to their sewer for the purpose of repairs, the whole of the timber stacks could be moved away in half a day.

On behalf of the London County Council it was contended that, as they had had to pay the predecessors in title of Vigers Bros. compensation for the easement created by the placing of their sewer under the land of Vigers Bros., they were entitled to refuse their licence for the use of the land situate above their sewer unless Vigers Bros. paid them the annual rent of 10*l*., and it was admitted that if Vigers Bros. had agreed to pay the said annual rental the London County Council would have granted to Vigers Bros. a licence to stack timber on the land above their sewer.

A member of the firm of Vigers Bros. stated in evidence that if they were not allowed to use their land above the sewer for the purpose of stacking timber it would sterilize a strip of land 10 feet wide extending from the front to the back of their wharf, a distance of about 120 yards, and it would

cause a very great difficulty in piling timber if no part of a stack was to be allowed to be placed on the land, and that they would have been quite willing to have agreed, without prejudice to their rights, to have taken a licence on the terms set out in the letter of the London County Council dated November 15, 1916; but they declined to pay a rental to the London County Council for such licence.

On behalf of the London County Council it was contended that no timber could be stacked on the land over the sewer without the licence, and that if timber was so stacked, or if a barge was lying on the mud in the Deptford Creek adjoining the wharf, it was an obstruction in, under, or over a sewer, and an offence had been committed by Vigers Bros. within the meaning of s. 68.

On behalf of Vigers Bros. it was contended that on the facts proved and admitted they had not caused an obstruction on or over the sewer, and that no licence of the London County Council was required for the mere placing temporarily on land over the sewer timber which could be easily moved, and which could do no harm and damage to the sewer, and that the London County Council were acting illegally in seeking to attach, as a condition of the grant of their licence, the claim for an annual rent of 10*l.* a year.

The magistrate held that Vigers Bros. had committed an offence by depositing stacks on their land under which was situated a sewer belonging to the London County Council, which timber, in his opinion, constituted an encroachment upon or over the said sewer within the meaning of s. 68 of the Metropolis Management Amendment Act, 1862, but that, in his opinion, the offences with which Vigers Bros. were charged were technical, and were trivial in nature, and there were extenuating circumstances. He accordingly dismissed the summons, under the provisions of s. 1 of the Probation of Offenders Act, 1907.

The questions for the determination of the Court were: (*a*) Whether the magistrate was correct in law in holding that the stacks of timber which Vigers Bros. placed on their land constituted an encroachment upon or over the sewer

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of the London County Council within s. 68 of the Metropolis Management Amendment Act, 1862.

(*b*) If he was correct in so holding whether he was further right in law in holding that the offences were trivial in nature, and/or that extenuating circumstances existed so as to justify him in dismissing the summonses under the provisions of s. 1 of the Probation of Offenders Act, 1907.

The magistrate, in the course of his considered judgment, said: "In my opinion such stacks were encroachments upon or over the sewer within the meaning of the words to be found in s. 68 of the Metropolis Management Amendment Act, 1862, and I think that the consent in writing of the London County Council was required for their erection and maintenance. It was not, I think, seriously suggested that the erection or existence of any or all of such stacks could affect the safety of the sewer. If such suggestion was intended, I do not accept it. The largest of the stacks could have been removed in a few hours, at most, if the London County Council should have desired at any time to open up the ground above the sewer where the stacks were placed; and I am satisfied that the erection and continuance of these stacks in no way prejudiced the Council in their user or enjoyment of the sewer. My conclusion that a written licence was necessary does not dispose of the matter. The Council, as appears from the correspondence, was willing to grant the licence subject to certain conditions. *Mr. Morton Smith*, on behalf of the defendants, contended that the Council has no power to impose conditions upon such a licence. I think the Council has at any rate an implied power to impose reasonable conditions to its licence, such e.g. as may be necessary to ensure the safety of the sewer, and they sought to impose such conditions by their letter of November 15, 1916. The letter, however, included amongst the proposed conditions one which I think was, in the circumstances, unreasonable, viz., the demand of an annual rental of 10*l.*, and I think, further, that the defendants properly resisted this condition. The result is that, in my view, though the defendants have committed technical offences with which they are charged,

the same are trivial in nature, and extenuating circumstances exist, two factors which permit of my dismissing the charges made under the provisions of s. 1 of the Probation of Offenders Act, 1907.

Colam K.C. and *R. Fortune* for Vigers Bros. The stacks of timber placed by the appellants on their land did not constitute an obstruction or encroachment to the sewer within the meaning of s. 68 of the Metropolis Management Amendment Act, 1862. To come within that section, the obstruction or encroachment must be something which physically affects and damages the sewer itself. The words of the section must be read distributively. "Upon" and "over" refer to "building" and "bridge." The only apt word to be used in connection with obstruction or encroachment is "in." The section was intended to vest the sewer in the local authority with a right of access to the sewer, in order to repair it. The County Council could get access to the sewer by sinking a shaft; they would not uncover the sewer throughout its length.

In any event, the magistrate was right in exercising his discretion and dismissing the summons on the ground that the offence was of a trifling nature, having regard to the facts which he found to exist.

Macmorran K.C. and *Roome* for the London County Council. The decision of the magistrate that these stacks of timber were an obstruction or encroachment upon or over the sewer within the meaning of s. 68 of the Act of 1862, and that, therefore, an offence had been committed, was correct. The section was intended to provide not only against injury to the sewer, but also to give a right of access to the sewer at any point. When the sewer was made compensation was paid to the owner of the land, and the land, therefore, cannot afterwards be used to the fullest extent. The Council have, under the section, a full right of access to the sewer, and the section applies to anything which could be an obstruction or encroachment to the right of access to the sewer.

The magistrate acted beyond his jurisdiction in treating the offence as being of a trivial nature and in dismissing

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the summons under the Probation of Offenders Act, 1907. It is clear, from the judgment of the magistrate, that he took into consideration matters which he was not entitled to take into consideration, viz., the demand by the Council for 10*l.* a year rent. The Council were entitled to refuse their licence, and the magistrate had no power to review their decision. He was not entitled to say that the demanding of 10*l.* a year was an unreasonable condition. It was held in *Phillips* v. *Evans* (1) that a court of summary jurisdiction was not entitled to say that a particular offence was an offence of a trifling nature.

Colam K.C. in reply. The section does not apply to an obstruction to the right of access to the sewer. As the right of access to the sewer was not expressly given by s. 68, but has to be implied, the right of access which ought to be implied is not any particular mode of access, but only such as is reasonably necessary to enable the sewer to be repaired. See *Birkenhead Corporation* v. *London & North Western Ry. Co.* (2)

DARLING J. I think the decision of the magistrate was right on both points. It appears to me that in placing this timber over the sewer the owners of the wharf placed an obstruction, or an encroachment, over the sewer. Although an encroachment is generally spoken of in relation to land, yet I think this pile of timber would be an encroachment over the sewer. Sect. 68 of the Metropolis Management Amendment Act, 1862, recognizes that the local authority, now the London County Council, may from time to time desire to repair their sewer. If they wanted to repair this sewer they could not do so until this pile of timber had been removed, and this would take a little time. In my opinion the pile of timber is equivalent to two fences, one on either side of the sewer. The fact that the pile of timber is solid does not prevent the effect from being the same as if two fences, some distance apart, had been put up. The pile of timber is either an "obstruction" or an "encroachment." I should be inclined to say that it is

(1) [1896] 1 Q. B. 305. (2) (1885) 15 Q. B. D. 572.

both, and therefore the magistrate was right in holding that an offence against s. 68 had been committed by Vigers Bros.

I also think that the magistrate was right in holding that the offence was of a trifling nature, and that there were extenuating circumstances. It is perfectly plain that if anything were required to be done to the sewer at this particular place a very considerable amount of work would be entailed, because the sewer is 26 feet below the surface of the ground, and it would take a considerable time to get to it. To my mind the fact that it would be necessary before commencing to dig a hole in the ground in order to get at the sewer to remove the pile of wood need not be considered, as it could be done in a few hours, as the magistrate found. It therefore appears to me that the magistrate had grounds on which he might hold, as he did, that the offence was trifling in nature, and that there were extenuating circumstances.

AVORY J. I am of the same opinion. It is said by Mr. Colam, in support of this appeal, that the alleged encroachment, consisting of the stacks of timber, was not an obstruction or encroachment upon or over a sewer within the meaning of s. 68 of the Metropolis Management Amendment Act, 1862. He suggested that the words "obstruction" or "encroachment" only apply to some obstruction of or encroachment upon the sewer itself, and that the words "over a sewer" are only used in connection with the words "building" or "bridge." The answer to that contention is to be found in the words of the section, which, after providing that every person who places an encroachment over a sewer shall be liable to a penalty, goes on to say: "and every person obstructing, filling in, or diverting any sewer" shall be liable to a penalty, so that both classes of persons are dealt with, those who place obstructions upon or over a sewer and those who obstruct the sewer itself by filling it in or by diverting it. It is obvious, therefore, that the words "encroachment upon or over" are not limited to an obstruction of the sewer itself. Therefore I think that point fails.

Then Mr. Macmorran contended, on the other side, that

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the magistrate was wrong in dismissing this charge as being trivial within the meaning of the Probation of Offenders Act, 1907. I am strongly of opinion that if the only ground for the magistrate's conclusion had been that the London County Council had asked a rental of 10*l.* a year for their licence or consent to place this timber over the sewer, and that in the magistrate's opinion the 10*l.* was too much, it would have been a bad reason, and it would have been the duty of this Court to say that the magistrate had no right, on that ground alone, to hold that the offence was trivial. But he found facts in his judgment when he said: "It was not, I think, seriously suggested that the erection or existence of any or all of such stacks could affect the safety of the sewer. If such suggestion was intended, I do not accept it. The largest of the stacks could have been removed in a few hours, at most, if the London County Council should have desired at any time to open up the ground above the sewer where the stacks were placed; and I am satisfied that the erection and continuance of these stacks in no way prejudiced the Council in their user or enjoyment of the sewer." Those facts, in my opinion, justified him in saying that, in his view, the offence was of a trivial nature. The authority of *Phillips* v. *Evans* (1), to which Mr. Macmorran called our attention, emphasizes the point that a court of summary jurisdiction is not entitled to say that a particular class of offence is, in its opinion, an offence of a trivial nature. In that case the Court said that the magistrate was not entitled to say that the keeping of a dog without a licence was a trivial offence. In this case I think the offence itself was not trifling, but that the circumstances affecting its commission make it trifling. There was ample evidence to justify the magistrate in so holding. The appeal fails, and must be dismissed.

SALTER J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for Vigers Bros.: *Trinder, Capron & Co.*

Solicitor for London County Council: *D. P. Andrews.*

(1) [1896] 1 Q. B. 305.

R. F. S

[IN THE COURT OF APPEAL.]

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October 31.

PORT OF LONDON AUTHORITY v. GRAY.

Employer and Workman—Injury by Accident—Partial Incapacity—Compensation—Principle of Assessment—Enlistment of Workman in the Army—Pay and Allowances—"Earnings"—"Suitable Employment"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *Sched. I.* (3.).

A workman who had been injured by accident arising out of and in the course of his employment, and partially incapacitated thereby, was afterwards called up on military service, he having previously attested under Lord Derby's scheme of recruiting.

In an arbitration under the Workmen's Compensation Act, 1906:—

Held, that in determining under Sched. I. (3.), the difference between the amount of his average weekly earnings before the accident and the average weekly amount which he was "earning or able to earn in some suitable employment or business after the accident," the amount of his Army pay and allowances ought to be taken into account.

Thomson v. *Watson* 1916 S. C. 23 explained.

Owners of S.S. Raphael v. *Brandy* [1911] A. C. 413 applied.

Appeal from a decision of the judge of the Bow County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The question arising upon the appeal was whether, in fixing the amount of the compensation due under the Act to the applicant, a workman who had been injured by accident while in the employment of the Port of London Authority, the arbitrator ought to have regard to the military pay and allowances received by the applicant, who, since the date of the accident, had been called up for service in the Army, he having previously attested under Lord Derby's recruiting scheme.

In February, 1912, the applicant, a married man, who was then earning 2*l.* a week in the service of the Port of London Authority, met with an accident, and thereby sustained an injury to his leg. He applied for an arbitration under the Act, and in April, 1912, an award was made in his favour, under which he was paid compensation, on the basis of total incapacity, at the rate of 1*l.* a week until June, 1916, when he was called up for military service.

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Since that time the Port Authority had discontinued the weekly payments pending consideration of their liability. From the time of his joining the Army until February, 1917, the applicant received 7*s.* a week as pay, and 12*s.* a week in respect of separation allowance. From February 6, 1917, to June 14, 1918, his pay was 7*s.* a week, and his separation allowance, owing to the birth of another child, was increased to 19*s.* a week. During the whole of both periods he received rations, which it was agreed were equivalent to 11*s.* a week. On the whole, therefore, during the first period, from June, 1916, to February, 1917, he was receiving a sum equivalent to 30*s.* a week, and during the second period, from February, 1917, to June, 1918, a sum equivalent to 37*s.* a week.

On June 4, 1918, he was discharged from the Army as no longer fit for military service. On June 12, 1918, the Port Authority offered to pay as compensation, on the basis of partial incapacity, the whole of the difference between his average weekly earnings, 2*l.*, before the accident and the weekly amounts received by him during his military service—i.e.,10*s.* a week from June, 1916, to February, 1917, and thereafter 3*s.* a week until June, 1918, and full compensation under the award as from that date. This offer having been refused, the Port Authority applied to reduce the amount of the weekly payment of compensation to a sum of 10*s.* during the first period and to 3*s.* during the second period; that was to say, to reduce the original amount of the compensation by the amount which the workman had received in pay and allowances from the military authorities.

The county court judge held, on the authority of *Thomson* v. *Watson* (1), that he ought not to take into consideration the amount received by the man for Army pay and allowances, and he accordingly dismissed the application to review.

The employers appealed, on the grounds that the judge was wrong in holding that in fixing the weekly payment the only test to be applied was what the workman earned

(1) 1916 S. C. 23.

or was able to earn in the open market, and also in holding that the Army pay and allowances of the man were not "earnings in some suitable employment" within the meaning of Sched. I. (3.) to the Workmen's Compensation Act, 1906. (1)

Sir E. Pollock K.C. and *C. B. Marriott* for the appellants. The view of the county court judge, that the amounts earned by the workman whilst in the Army ought to be excluded from consideration in fixing the weekly payment due to him under the Act is erroneous—first, because the man actually earned, and received, those amounts; and secondly because he earned them "in some suitable employment" within the meaning of Sched. I. clause 3. His pay, and other emoluments of his service as a soldier, are "earnings" within clause 3, although there may be no contract between him and the Crown, and no right on his part to sue for his pay and allowances. His pay is not a gratuity or compassionate allowance; it is secured to him by the Army Act, 1881, s. 136, and the Royal Warrant of 1909 relating to Army pay.

Under clause 3 of Sched. I. the arbitrator is entitled to test the amount of the workman's "average weekly earnings" by what he is actually earning, or is able to earn, in some suitable employment—i.e., what he ought to be earning.

[SWINFEN EADY M.R. The amount which he is earning, or is able to earn, whichever is the larger sum.] Yes. Suppose the case of a skilled workman accepting inferior work, when he would be able in his own trade to earn much more.

[DUKE L.J. Do those considerations apply to the case of a man who is compulsorily called to the colours?]

That is the question. Different considerations may apply to the wife's separation allowance.

(1) Workmen's Compensation Act, 1906, Sched. I. (3.): "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

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The county court judge founded his judgment upon *Thomson* v. *Watson*. (1) That case, however, does not support his conclusion.

The principles regulating the application of this clause of Sched. I. have been much discussed. See *Heathcote* v. *Haunchwood Collieries* (2), *Woodilee Coal & Coke Co.* v. *M'Neill* (3), *Bevan* v. *Energlyn Colliery Co.* (4) It is said that money received by a soldier for pay and allowances is not to be considered; but that is contrary to the principle of *Penn* v. *Spiers & Pond* (5), where "tips" received by a waiter in his calling were treated as part of his "earnings." Here the workman has been removed from the sphere in which he might have earned money to the relief of his employer; but he has received pay and emoluments which the employer is entitled to have taken into consideration by the arbitrator. Whether his service in the Army is voluntary or compulsory is immaterial.

[SWINFEN EADY M.R. The pay of a man in the Royal Naval Reserve has been treated as "earnings": *Owners of s.s. Raphael* v. *Brandy*. (6)]

In *Norman & Burt* v. *Walder* (7) it was held, under the Act of 1897, that the arbitrator ought to take into consideration the earnings of a workman in a business that he had started after the accident in respect of which he was claiming compensation. The scheme of the Act is to give compensation for loss of earning capacity, and not to enable the workman to make a profit.

That case was commented on in *Calico Printers' Association* v. *Higham* (8), but not dissented from.

In *Great Northern Ry. Co.* v. *Dawson* (9) the value to a workman of the use of a uniform provided by his employers was held to be properly taken into account as part of his earnings; and in *Dothie* v. *Robert Macandrew & Co.* (10), which turned upon the word "remuneration" in s. 13 of the Act,

(1) 1916 S. C. 23.
(2) [1918] A. C. 52.
(3) [1918] A. C. 43.
(4) [1912] 1 K. B. 63.
(5) [1908] 1 K. B. 766.
(6) [1911] A. C. 413.
(7) [1904] 2 K. B. 27.
(8) [1912] 1 K. B. 93, 102.
(9) [1905] 1 K. B. 331.
(10) [1908] 1 K. B. 803.

the question of taking into account the value of board and lodging provided for a workman by his employer was dealt with. *Skailes* v. *Blue Anchor Line* (1) was a similar case under the same section, and it was held there that there was no distinction between "remuneration" and "earnings." Whatever the workman is receiving is to be brought into account, so that he shall be compensated for loss, but not make a profit. Upon this principle military pay and rations should certainly be taken into account, and it is submitted that the separation allowance should be similarly dealt with. It represents money's worth to the workman, inasmuch as it relieves him from the obligation to support his wife and children.

Daniel Ward for the respondent. These Army payments should not be taken into account. The respondent, while he was in the Army, was not a "workman" within the meaning of the Act. Service in the Army is not "suitable employment or business" within Sched. I. (3.).

SWINFEN EADY M.R. (after stating the facts). No question arises with regard to any compensation payable in respect of the period since June 4, 1918. It is not the subject of this application. The period that is under consideration on this appeal is the period during which the man was in the Army—viz., from June 14, 1916, until June 4, 1918. The figures are agreed between the parties. Between June 14, 1916, and February 6, 1917, the workman received 7*s.* weekly as Army pay; his rations and quarters were, by agreement in the court below, taken as being worth 11*s.* a week. So that he received, first, in money 7*s.* weekly; secondly, in rations and quarters 11*s.* weekly; and in addition he was paid in respect of the separation allowance 12*s.* weekly; so that during that period he was in receipt of 30*s.* a week, his old pay being 40*s.* The difference, therefore, between what he was paid when he was at work and what he received, with pay and allowances, whilst he was in the Army, was 10*s.* a week. It was at one

(1) [1911] 1 K. B. 360.

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time suggested that the separation allowance was not made to the man himself, and could hardly be treated on the same footing as pay and rations, but no such point was made in the Court below. Counsel for the respondent has properly admitted that the real point, and the only point, in the case is whether, on the application to reduce the man's compensation, in calculating the average weekly amount which he was earning after the accident, the agreed amounts that he was receiving during the time that he was in the Army ought to be taken into consideration. The contention of the employers on this application to review was that the most that the man was entitled to, and the sum that they were willing to pay, was the full amount of difference between his old earnings and what he received in respect of his Army service—that is to say, 10*s.* in respect of the first period from June 14, 1914, to February 6, 1917, and 3*s.* in respect of the second period, February 6, 1917, to June 4, 1918. On the other hand, the workman contended that the moneys received in respect of Army pay and allowances were not "earnings" that ought to be taken into account under the provisions of the Workmen's Compensation Act.

It was admitted that during the period when the man was in the Army his case was one of partial incapacity. Schedule I., clause (3.), provides that in fixing the amount of the weekly payment, that is, the weekly payment to the injured workman in the case of partial incapacity—which was this case—the weekly payment shall in no case exceed the amount of the difference between the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper. The contention on behalf of the workman is that having regard to the language of this clause, "the amount which he is earning" is a phrase which is inapplicable to his Army pay and allowances. It is argued that you cannot treat those as "earnings" within the meaning of the Act. The learned judge below proceeded, as I gather,

entirely upon *Thomson* v. *Watson* (1), which he considered determined this matter. He commented upon it as being badly reported. The report which he had before him is not mentioned, and it may be that it was an insufficient report, because he stated that the conclusion which he drew from the case was that the judges in the Court of Session must have been of opinion not merely that what a man can earn in the open market is the best test of what he can earn, but that what he earns in the open market is the only test which ought to be applied, and he conceived that he was bound by that decision to exclude from the man's earnings any Army pay, and that the only test that he ought to apply was what the man could earn in the open market. He says that test has not been applied in this case. The man was in the Army all the time, and he says, "I cannot assume that if that test had been applied it would have turned out that the employers were entitled to reduce the compensation by the amount that they are now asking to reduce it by." Then he says, "I have only to add if once the test mentioned in the Act were set aside so as to leave it open to either party to set up some other test settled by themselves, confusion of the worst description would be the inevitable result." The conclusion which he arrived at was that the test of the open market was not available, and that no other test could be applied. Therefore he refused altogether the application of the employers to review the award. When, however, the case in the Court of Session is looked at it affords no ground for the conclusion at which the learned judge arrived, because the language of the Lord President and Lord Mackenzie points in exactly the opposite direction. The case is reported at length. (1) It was the case of a workman partially incapacitated. He was receiving weekly payments of compensation. Then he enlisted in the Army, and the employers applied to review. The view that the arbitrator, the sheriff substitute, had taken was this: He said, "In my opinion, suitable employment or business means industrial or commercial employment in which the workman may earn as much money as his physical condition permits,

(1) 1916 S. C. 23.

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and does not mean naval or military service. The appellant did not enlist in order to earn wages. Accordingly, however creditable his action has been in enlisting, he has thereby made it impossible for the employers to assess the extent to which he is at present disabled in respect of myositis " (that was the industrial disease from which he was suffering) " from earning full wages at his work." He therefore issued an award suspending the compensation altogether, and it was from that that the workman appealed.

In the present case what the learned judge has done has been to allow full compensation. In *Thomson* v. *Watson* (1) the award was suspended altogether. Then there was an appeal to the Court of Session, and it was pointed out that that course was wrong, Lord Mackenzie putting it in this way (2): "I so far agree with the learned arbitrator that I do not think the workman in this case is entitled to have his compensation assessed on the footing that what he is earning as a soldier is all that he is able to earn, because serving with the colours is not, in the sense of the statute, a suitable employment which enables the workman to say that he has tested the market and is giving his service in return for the wages that he is able to earn." The other members of the Court concurred. In other words, the decision was not that his payment was not to be taken into account—it was to be taken into account—but it does not follow that after taking that into account you are to stop there, because it may be that there is also a further sum to be taken into account having regard to his wage-earning capacity.

Another case referred to was *Bevan* v. *Energlyn Colliery Co.* (3) The decision there was that in considering the amount of the weekly payments the Court was to have regard to extraneous circumstances, such as a general reduction in wages since the date of the accident, but Lord Justice Farwell pointed out in dealing with this provision that " the average weekly amount which he is earning " is a question of actual fact as to what he is earning. Then next, " What he

(1) 1916 S. C. 23. (2) 1916 S. C. 26.
(3) [1912] 1 K. B. 63, 72.

is able to earn in some suitable employment or business after the accident" is a question of estimate only, but what he is actually earning is a matter of fact.

Then the last case on that point is *Heathcote* v. *Haunchwood Collieries.* (1) There both Lord Dunedin and Lord Atkinson dealt with the proper interpretation of this clause with regard to compensation. Lord Dunedin said: "There is one point which was not touched in that case, and which in one sense arises for consideration in this, and that is upon the words 'is earning or is able to earn.' I have no doubt that although prima facie what a man is de facto earning must be taken into consideration first, yet it would be perfectly possible for those who objected to that figure being taken to urge and show that the amount he was earning was not really what he might earn if he took proper steps to get the most remunerative employment he could find. I have not a doubt that that inquiry would be perfectly competent; but I think it is in accordance with common sense that if you find a man actually at work you would always begin at least with the consideration of the figure which he was actually earning." Lord Atkinson said as to paragraph 3: "It is perfectly obvious, if one takes the whole object of these Acts and rules into consideration, that the object to be effected by the words 'which he is earning or is able to earn in some suitable employment' was to prevent an employer being mulcted by an injured workman either refusing to work at all, or deliberately taking a wage less than he could have got; and it certainly appears to me that once you have a man in employment earning a wage it is for those who allege that that is not bona fide—that he is taking less than he could get and thereby imposing a greater burden upon his employer—to prove it." Now that language makes clear what even without it I should have thought was sufficiently clear from the language of the provision in the Schedule "In fixing the amount of the weekly payment it shall in no case exceed the difference between"—now the Schedule lays down the maximum amount. In the early part it has determined the maximum amount in two respects. One is that

(1) [1918] A. C. 52, 56, 57.

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the allowance is not to exceed 50 per cent. of the wages that the man was actually earning. That is one maximum. That is fixed in clause 1, sub-clause (*b*). The second respect in which the maximum is fixed is 1*l.* a week, and clause 3 deals with the third respect in which the maximum amount is fixed by providing that it is not to exceed the difference between two sums. One sum is the amount of his average weekly earnings before the accident, and the other is the average weekly amount he is earning or is able to earn in some suitable employment or business after the accident. In my opinion that has to be read in this way. You are to take, first, the average weekly amount which he is earning. Prima facie that is the amount which he can earn. It may be that he can earn more. It may be that the employers have reason to think that he has taken a light employment at less wage than he could really earn in order to increase the compensation, so you get the alternative phrase, " or is able to earn in some suitable employment or business " ; but the minimum to be brought in under the second branch is what he is earning, and therefore the difference between his average weekly earnings before the accident and what he is earning is, at all events, the maximum. It may be that that amount may be reduced by saying that he should earn more than he is earning, and therefore the difference ought to be less, but in any case you are to take into account what he is earning. Then it is said, " If you are to take into account what he is earning you ought to bring in what he is receiving from the State in respect of his pay." I have pointed out that in the Scottish case it was obviously the opinion of the Court that that amount ought to be brought into account.

In addition there is the case to which I drew Sir Ernest Pollock's attention — viz., *Owners of s.s. Raphael* v. *Brandy*. (1) That was a case of naval service. The man being a stoker in the Royal Naval Reserve received an allowance of 6*l.* a year, in consideration of which he had to hold himself ready for service when required. He sustained injuries by accident which disabled him, and, in considering what his average weekly earnings were, it was held in his

(1) [1911] A. C. 413.

favour that the amount that he so received in respect of his continuing to serve in the Royal Naval Reserve had to be taken into account. It is pointed out that under the provisions of the Army Act, where a recruit enlists in the Army he enters into a contract, he agrees to serve. The word "contract" is specifically mentioned in s. 80 of the Army Act, 1881. In my opinion no distinction can be drawn between pay received for military service and pay received in respect of service in the Royal Naval Reserve; both are "earnings" which the man receives. It has been pointed out frequently that the Act speaks not of "wages" but of "earnings," and reference has been made to many advantages of various kinds which it has been held must be taken into account in estimating the man's earnings. In *Penn* v. *Spiers & Pond* (1) a man's meals were taken into account at an agreed figure of 12*s.* a week, so also were his gratuities taken into account. In *Great Northern Ry.* v. *Dawson* (2) the uniform supplied to a man by the company was taken into account, and in *Norman & Burt* v. *Walder* (3), earnings in an independent business were taken into account. All these matters have been taken into account in favour of the man in considering what his earnings were, the object of the Act being to compensate the man for any loss or injury he might sustain by reason of the accident. In *Owners of s.s. Raphael* v. *Brandy* (4) Lord Shaw said that "in calculating the scale of compensation it appears to me that the sound construction of the Act and an accurate principle as to the measure of loss and injury both happen to concur." I think the county court judge was wrong in excluding in respect of these two periods the agreed sums of 30*s.* and 37*s.* a week which the man was receiving, as they ought to be treated as his earnings, and therefore that the amount which the employers insisted they were alone liable to pay—namely, 10*s.* in respect of the first period and 3*s.* a week in respect of the second period, those sums being the maximum amount which could be awarded to the workman in each case—was the

(1) [1908] 1 K. B. 766.
(2) [1905] 1 K. B. 331.
(3) [1904] 2 K. B. 27.
(4) [1911] A. C. 416.

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right amount, and that the award ought to proceed upon those lines. I understand that the county court judge stayed proceedings upon the employer paying to the workman sums calculated upon that footing, so that I gather those sums have actually been paid. In my opinion we ought to allow the appeal.

DUKE L.J. In this case the workman, to use the expression in the Workmen's Compensation Act, had enlisted, and had been engaged upon military service pursuant to his enlistment from the June 14, 1916, to the June 4, 1918, and the only question necessary to be answered for the decision of this appeal is what ought to be done as between him and the employer, having regard to the provisions in clause 3 of the First Schedule of the Act of 1906, with regard to the gains he had by reason of his voluntary military service between June, 1916, and June, 1918. The figures appear to be agreed. The amount of pay is agreed, the valuation of the rations is agreed, and it must be taken after what we have heard here that the cash equivalent of the separation allowance is agreed. So that the only matter that remains to be decided is whether with regard to those agreed amounts it can be said that they were amounts which the workman was earning within the true meaning of Sched. I., clause (3.). It is not necessary to consider what would be the position of a man serving under the terms of the law now existing with regard to compulsory military service, whether in the case of such a man his pay and emoluments ought to be taken as earnings within the Act. I express no opinion one way or the other as to that, but with regard to this man, who voluntarily enlisted, the question appears to be amply covered by authority.

In *Norman & Burt* v. *Walder* (1) it had been laid down that although the claimant in such a case as the present had ceased to be a "workman" by having gone into business on his own account and was not in any employment—he was neither a workman nor in any employment within the meaning of those terms in the Workmen's Compensation Act—nevertheless he

(1) [1904] 2 K. B. 31.

might be earning within the meaning of clause 3. So that we have arrived at this point, that without being a workman and without having an employer in the statutory sense, nevertheless he may be earning. *Owners of s.s. Raphael* v. *Brandy* (1) decides that the reserve pay of a stoker in the Naval Service is earnings. It seems to me to follow that the gains of a voluntarily enlisted private soldier in the present case were earnings, and if the learned county court judge had had before him the full report of the decision of the Court of Session, I think he must have seen that the Court of Session had taken the same view. So far from taking the view that moneys gained by an enlisted soldier were not earnings, the Court decided that they were earnings, but that they must not be taken to be the full measure of the man's earning capacity. On those grounds it appears to me that the appeal ought to be allowed.

EVE J. It would, in my opinion, work a great injustice if we were constrained in this case to adopt the view of the Court below. In money and kind the respondent was for well-nigh two years in receipt of pay and remuneration from the State for services voluntarily rendered, and I can see no plausible ground for discriminating between those payments and sums earned in other modes of employment when the question arises whether or no they are to be taken into account in ascertaining what is the continued or continuing liability of the employers. I think that the sums were bound to be taken into account, and that the appeal should be allowed.

Appeal allowed.

Solicitor for appellants: *Ernest Glenshaw.*
Solicitor for respondent: *Walter H. Cowl.*

G. A. S

(1) [1911] A. C. 413.

1918
October 17.

PEARL MILL CO., LIMITED *v.* IVY TANNERY CO., LIMITED.

Sale of Goods—Contract—"Delivery as required"—Determination of Contract—Inordinate lapse of Time—Notice by Seller requesting Instructions as to Delivery—Estoppel.

In September, 1913, the defendants by their representative contracted to sell to the plaintiffs 50 dozen red Welsh roller skins at 27*s.* per dozen "delivery as required." Between the middle of November, 1913, and the end of September, 1914, the defendants delivered 20 dozen skins at the request of the plaintiffs in 4 lots of 5 dozen each, but no further deliveries took place nor were any requested by the plaintiffs, their manager having forgotten the existence of the contract. In June, 1915, the defendants' representative left their employ, and in July, 1915, the plaintiffs gave him a personal order for and accepted delivery of 50 dozen skins of the same kind and at the same price as that specified in the contract with the defendants. Between June, 1915, and April, 1916, another representative of the defendants called upon the plaintiffs for orders, but was told there was nothing for him. In November, 1915, the defendants by letter offered the plaintiffs 20 to 30 dozen skins similar to those previously supplied to them and at the same price, but the plaintiffs replied that they had bought some time ago their requirements for the next year. In July, 1917, the plaintiffs requested the delivery of the remaining 30 dozen skins under the contract, but the defendants refused to deliver them, alleging that the contract was no longer in existence. The plaintiffs having brought an action in the county court to recover damages for the defendants' breach of contract in refusing to deliver the remaining skins, the county court judge held that the plaintiffs had abandoned the contract, but whether he was right or wrong on that point that they behaved in such a way that the defendants reasonably believed that the plaintiffs considered the contract was at an end, and gave judgment for the defendants. Upon an appeal by the plaintiffs to the Divisional Court:—

Held, (1.) that an inordinate delay on the part of both sides having taken place it was not necessary, in order to put an end to the contract, for the defendants to give notice to the plaintiffs that if they did not request further deliveries the defendants would cancel the contract, and that there was evidence upon which the county court judge could find that the contract had been abandoned; (2.) that upon the facts the county court judge was justified in finding that the plaintiffs were estopped from denying that the contract had come to an end.

Jones v. *Gibbons* (1853) 8 Ex. 920 explained.

APPEAL by the plaintiffs from a judgment of the judge of the Oldham County Court.

The action was brought in the county court to recover 70*l.* 10*s.* damages for the defendants' breach of contract in

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refusing to deliver to the plaintiffs 30 dozen red Welsh roller skins.

On September 26, 1913, a contract in writing was entered into between the defendants by their representative one Mills and the plaintiffs for the sale by the defendants to the plaintiffs of 50 dozen red Welsh roller skins at 27*s.* per dozen, "delivery as required." Under the contract 20 dozen skins were delivered between November 19, 1913, and September 29, 1914, by the defendants to the plaintiffs at their request in 4 lots of 5 dozen each, viz., on November 19, 1913, February 24, 1914, June 24, 1914, and September 29, 1914, respectively, leaving 30 dozen skins undelivered. Mills called on the plaintiffs about twice in 1914 and 1915, but from September 29, 1914, to July 13, 1917, no further deliveries were made by the defendants nor were any requested by the plaintiffs, the plaintiffs' manager having forgotten the existence of the contract and Mills having left the service of the defendants in June, 1915. In July, 1915, the plaintiffs gave Mills a personal order for 50 dozen skins of the same kind and at the same price as that specified in the contract of September 26, 1913, of which they took delivery. Between June, 1915, and April, 1916, one Moorhouse, who had succeeded Mills as the defendants' representative, called upon the plaintiffs and sent in his card to the plaintiffs' managing director with a message that he desired further orders. He however only saw the plaintiffs' lodgekeeper, and the reply sent by the plaintiffs' managing director was that there was nothing for him. On November 15, 1915, the defendants by letter offered the plaintiffs a small parcel of 20 to 30 dozen roller skins similar to those previously supplied and at the same price, but the plaintiffs replied that they had bought some time ago their requirements for the next year. On July 13, 1917, the plaintiffs wrote to the defendants requesting the delivery of the remaining 30 dozen skins under the contract. On July 14, 1917, the defendants replied saying that the plaintiffs had taken delivery at the rate of 5 dozen skins per quarter up to September 29, 1914, and that as there had been no deliveries since then, the contract expired in March, 1916. On July 17, 1917, the plaintiffs replied that the

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delay was caused by the change in representatives and insisting upon delivery. As the defendants in further correspondence still contended that the contract had expired, the plaintiffs brought the action to recover the 70*l.* 10*s.* damages for breach of the contract, being the difference between the price of 30 dozen skins under the contract and the market price on July 14, 1917.

No evidence was given that the defendants had at any time requested the plaintiffs to take delivery of the remaining 30 dozen skins.

The county court judge found that the plaintiffs had made up their minds to abandon the contract; and, whether his finding on that point was correct or not, that they behaved in such a way that the defendants reasonably believed that the plaintiffs considered that the contract was at an end.

He therefore gave judgment for the defendants.

The plaintiffs appealed.

Eastham for the plaintiffs. Where there is a contract for the sale of goods "delivery as required," and the buyer does not request delivery within a reasonable time, there is an obligation on the seller, if he desires to cancel the contract, to give notice to the buyer that if instructions for delivery are not given, he (the seller) will cancel the contract: *Jones* v. *Gibbons* (1); and if the seller omits to do so, the contract is kept alive.

Claughton Scott for the defendants. The only point decided in *Jones* v. *Gibbons* (1) was that a mere plea that the plaintiff did not within a reasonable time request the defendant to deliver the iron was not sufficient as a defence to the action. It did not decide that a contract of sale "delivery as required" cannot be put an end to in any other way than by the seller giving notice to the buyer that if the buyer does not give delivery instructions, he (the seller) will cancel the contract. In the present case nearly three years elapsed between the last delivery and the request by the plaintiffs for further deliveries. The delay on the part of the plaintiffs was so great as to justify

(1) 8 Ex. 920.

the defendants in treating the contract as determined and in refusing to make any further deliveries: *Freeth* v. *Burr*. (1)

Eastham, in reply. In *Jones* v. *Gibbons* (2), Pollock C.B. said: "It seems to me reasonable that the party who seeks to put an end to the contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them." That principle applies to the present case.

ROWLATT J. In my judgment this appeal fails. The question is whether *Jones* v. *Gibbons* (3) in effect lays down the proposition that a contract of this kind cannot come to an end by reason of lapse of time without steps being taken such as the notice being given which is mentioned in that case. I do not think it does anything of the kind. *Jones* v. *Gibbons* (3) was decided upon a demurrer to the replication which raised the question whether the plea was good or bad. The plea simply stated that the plaintiff did not "within a reasonable time after the making of the contract, request the defendant to deliver the iron." The first point decided was that where goods are to be delivered as required, that requirement must be within a reasonable time. The Court held further, that if the defendant desired to put an end to the contract on the ground that a reasonable time had expired, he must give notice to that effect. That decision deals with the position where the only point taken is that the buyer is in default by not asking for delivery within a reasonable time. He may be, consistently with that position, anxious to keep the contract, but if he will not come up to the point of making a demand for delivery the seller can bring him to the point by saying: "I shall cancel unless you ask for delivery by such and such a day." But he cannot bring the contract to an end by doing nothing and merely pleading that a reasonable time has elapsed. That case is not the same as the one we have to consider, which does not turn in that sense upon merely the lapse of a reasonable time but upon a lapse of time which may be very much more

(1) [1874] L. R. 9 C. P. 208. (2) 8 Ex. 920, 922.
(3) 8 Ex. 920

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Rowlatt J.

than that which would be a reasonable time for the purposes of the question in *Jones* v. *Gibbons* (1)—viz., a lapse of time, allowed to pass by both sides, so long as to induce the Court to draw the inference that both parties thought that each of them had treated the contract as at an end. As I understand it, the learned county court judge took that view. He held that there were two entirely different ways in which the contract could be put an end to—one by the machinery of *Jones* v. *Gibbons* (1), and the other by the operation of the principle which, although the facts and the form of the application of it are entirely different, is the principle to be found in cases like *Freeth* v. *Burr* (2), that is to say, when each party apprehends that the other abandons the contract. He held that the latter principle applied to the present case—that is, that there had been not merely the lapse of a reasonable time giving an option to the vendee to determine the contract by notice, but that the lapse of time had been so long on both sides that he thought that the proper inference to be drawn was that each party was justified in assuming that the matter was off altogether. If that is so, the only question is whether there were materials on which he could come to that conclusion. I think that there were plenty of materials. The lapse of time alone was enough, but it was a pure question of fact on which there were materials before him which justified him in coming to the conclusion at which he arrived, and therefore we cannot interfere with his decision.

McCARDIE J. I agree. I think that the point before us is one of considerable commercial importance. The words "as required" appear in a very large number of commercial contracts throughout the country. Those words were interpreted in *Jones* v. *Gibbons* (1), and it was held that the mere lapse of a reasonable time did not entitle the vendor to put an end to the contract, but that before he could take that course he must give notice to the vendee. I regard *Jones* v. *Gibbons* (1) as a well settled and weighty authority, but in my view it in no way conflicts with other and

(1) 8 Ex. 920. (2) L. R. 9 C. P. 208.

well known principles of law, such as that which permits parties to rescind, or that which leads the Court to infer the abandonment of contractual obligations. Contracts for the sale of goods frequently require the performance of acts by a vendee before the obligation of delivery falls or becomes imperative upon the vendor—for example, where the class of goods, the size, or the quantities must be specified by the purchaser. In such a contract where the words "as required," or the like words, do not appear, then upon the passing of a reasonable time the vendee will have lost his right to call upon the vendor to deliver; but where the words "as required" appear a particular duty is cast upon the vendor by virtue of the decision in *Jones* v. *Gibbons*. (1) Reasonable time is of course a matter which depends upon the nature of the contract, its terms, the class of goods, the practice of the trade, and the general circumstances of the case. In my opinion, where the contract is one to which *Jones* v. *Gibbons* (1) applies it is clear that the mere lapse of a reasonable time does not ipso facto deprive the vendee of his rights, but that rule in no way prevents the operation of the other rules of law which are applicable to contracts. Mere delay or the mere lapse of reasonable time is one thing, but an inordinate lapse of time is wholly different. The former may not give rise to the implication of abandonment, the latter may do so.

In the present case I am satisfied that the learned county court judge came to the conclusion that the lapse of time under the circumstances was so great that the proper inference to draw was that the parties had mutually abandoned the contract. The delay was indeed serious; and the whole circumstances pointed to the conclusion that neither party continued to have the contract in mind. I think there was ample evidence on which the learned county court judge could come to the conclusion he did that the contract had been abandoned.

There is one further ground on which, in my opinion upon the facts and documents proved, he could also give judgment in favour of the defendants, that is, upon the principle of estoppel which is represented by the well-known cases of

(1) 8 Ex. 920.

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McCardie J.

Pickard v. *Sears* (1), *Cornish* v. *Abington* (2), and similar authorities. I think, having regard to the documents and to the facts proved before the learned county court judge, that he was entitled to find that the conduct of the plaintiffs was such as reasonably to lead the defendants to the conclusion that the plaintiffs had regarded the contract as at an end. Therefore, whether upon the ground of abandonment or of estoppel, in my opinion the learned county court judge was right in the conclusion at which he arrived.

Appeal dismissed.

Solicitors for plaintiffs: *Chester, Broome & Griffiths, for H. Booth & Sons, Oldham.*

Solicitors for defendants: *Church, Adams, Prior & Bulmer, for Cobbett, Wheeler & Cobbett, Manchester.*

J. E. A

1918
Nov. 12, 13.

PORT OF LONDON AUTHORITY, APPELLANTS *v.* ORSETT UNION ASSESSMENT COMMITTEE, RESPONDENTS. (3)

Poor Rate—Docks—Rateable Value—Calculation of Profits—Whether Excess Profits Duty ought to be deducted.

A rating authority when assessing the rateable value of a hereditament capable of earning profits, such as a dock, is entitled to take into consideration the liability of the occupiers to pay excess profits duty.

CASE stated by the Quarter Sessions of Essex on an appeal by the Port of London Authority against a rate for the relief of the poor of the parish of Chadwell St. Mary in the Orsett Union made October 27, 1916.

The Port of London Authority (hereinafter called the Port Authority) are a body corporate established by the Port of London Act, 1908 (8 Edw. 7, c. 68), for the purpose of administering, preserving and improving the Port of London. By

(1) (1837) 6 Ad. & E. 469. (2) (1859) 4 H. & N. 549.

(3) The terms "appellants" and "respondents" are used in this report with reference to the parties filling those positions on the appeal to the quarter sessions.

the said Act the undertakings of the London and India Docks Company, the Surrey Commercial Dock Company, and the Millwall Dock Company were transferred to and vested in the Port Authority, and the said Authority were empowered to demand and take rates in respect of vessels entering, lying in or departing from the docks, basins, cuts or entrances so vested in them.

The Tilbury Docks (of which the hereditaments the subject of the said appeal formed part) were part of the undertaking of the London and India Docks Company, which was so transferred to and vested in the Port Authority.

In consequence of the war the port of Southampton was appropriated exclusively to the ships belonging to or in the service of His Majesty's Navy, and was closed to ordinary merchant shipping. In consequence, many ships conveying merchandise were diverted from Southampton to the port of London. By reason mainly of this the tonnage of ships entering the Tilbury Docks in the financial year ending March 31, 1916, did in fact rise in excess of the ships' tonnage entering the said docks before the war.

In the said poor rate made October 27, 1916, for the parish of Chadwell St. Mary (which rate was the subject of this appeal) the Port Authority were rated as the occupiers of certain hereditaments forming part of the Tilbury Docks and their appurtenances at the sum of 119,240*l.* as the gross estimated rental and the sum of 64,440*l.* as the rateable value; and the Port Authority contended (inter alia) that they were over-rated both as to the gross estimated rental and the rateable value of the said hereditaments. In the course of the hearing of the said appeal it was agreed between the parties thereto that the sum to be deducted from the gross estimated rental of the said hereditaments for the probable average annual cost of repairs, insurance and other expenses (if any) necessary to maintain the said hereditaments in a state to command the rent, pursuant to s. 1 of the Parochial Assessments Act, 1836, was to be taken at 54,800*l.*, being the amount allowed in the said rate. In the valuation list in force before the making of the rate under appeal the Port Authority were

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McCardie J.

Pickard v. *Sears* (1), *Cornish* v. *Abington* (2), and similar authorities. I think, having regard to the documents and to the facts proved before the learned county court judge, that he was entitled to find that the conduct of the plaintiffs was such as reasonably to lead the defendants to the conclusion that the plaintiffs had regarded the contract as at an end. Therefore, whether upon the ground of abandonment or of estoppel, in my opinion the learned county court judge was right in the conclusion at which he arrived.

Appeal dismissed.

Solicitors for plaintiffs: *Chester, Broome & Griffiths, for H. Booth & Sons, Oldham.*

Solicitors for defendants: *Church, Adams, Prior & Bulmer, for Cobbett, Wheeler & Co[illegible] Manchester.*

Port of London Authority v. *Orsett Union Assessment Committee* [1919] 1 K. B. 84.

Overruled. YEOVIL RURAL DISTRICT COUNCIL *v.* SOUTH SOMERSET AND DISTRICT ELECTRICITY COMPANY LIMITED [1948] 1 K. B. 130

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Nov. 12, 13.

PORT OF LONDON AUTHORITY v. ORSETT UNION ASSESSMENT COMMITTEE, RESPONDENTS. (3)

Poor Rate—Docks—Rateable Value—Calculation of Profits—Whether Excess Profits Duty ought to be deducted.

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assessed in respect of the said hereditaments at 85,000*l.* as the gross estimated rental, and 38,200*l.* as the rateable value.

In consequence of the general rise in wages and other expenditure owing to war conditions, the Port Authority had substantially increased the dues charged on vessels entering their docks since March, 1916. The additional amounts falling to be paid by reason of the rise in wages and other expenditure were taken into account in arriving at the amount of 54,800*l.* agreed to be deducted as aforesaid, and also in arriving at the expenses in the next succeeding paragraph referred to.

Both parties to the said appeal agreed that the gross estimated rental and rateable value of the said hereditaments were to be arrived at by some process of calculation based on the receipts and expenses of the Port Authority in respect of the said hereditaments either for one or more years. The Port Authority put forward calculations based on the accounts for the two financial years ending respectively on March 31, 1914 (being the last year before the commencement of the war), and March 31, 1916 (being the last year before the making of the rate appealed against). The Assessment Committee put forward calculations based on the accounts for the financial year ending March 31, 1916. These two sets of calculations differed upon the following point, amongst others: The Port Authority claimed that in arriving at the rateable value of the said hereditaments by any process of calculation based on their receipts in respect thereof a deduction should be made in respect of the liability or alleged liability of the Port Authority to pay excess profits duty.

The Commissioners of Inland Revenue had made assessments under the Finance (No. 2) Act, 1915, Part III., upon the Port Authority in respect of their entire undertaking whereby the Port Authority were charged in respect of the financial year ending March 31, 1915, the sum of 93,055*l.*, and in respect of the financial year ending March 31, 1916, the sum of 234,991*l.*, but no separate assessment had been made in respect of the Tilbury Dock as such. The Port Authority disputed their liability to any such assessment at all, and before the date of the hearing of the said appeal at the Essex quarter sessions they

had given notice of appeal to the Special Commissioners under the Income Tax Acts against the said assessments for excess profits duty, but the said appeal had not been heard by the Commissioners.

The Port Authority contended before the quarter sessions that even though the liability to pay excess profits duty and the amount of that liability had not been finally determined on October 27, 1916, the date of the rate under appeal, any hypothetical tenant of the Tilbury Docks (being part of the Port Authority's undertaking) must be regarded as taking into account, before agreeing to pay any given rent for the said docks, the liability (or alleged liability) of the person carrying on the said docks to pay to the Crown excess profits duty, and accordingly they claimed to deduct the whole of the duty in respect of the amount by which they contended that the profits of the hereditaments rated exceeded in the year ending March 31, 1916, the profits for the year ending March 31, 1914.

The Assessment Committee contended that no deduction for excess profits duty should be made from the Port Authority's receipts in respect of the said Tilbury Docks because the Port Authority at the date of the hearing at quarter sessions were disputing liability to pay the said duty; and/or because there was not, or might not be, any duty properly payable; and/or because there was no evidence as to whether any, and if so what, part of the amount of the duty claimed was properly attributable to the hereditament rated if treated as a separate and distinct hereditament or as a specific part of the Authority's whole undertaking; and/or because the said duty (if chargeable at all on the profits of the undertaking of the Port Authority) was chargeable only in respect of the profits earned by the said undertaking after deducting all the expenses of earning such profits, and that the hypothetical tenant's rent (which under the Parochial Assessments Act, 1836, s. 1, was made the measure of rateable value) was one of the expenses which the hypothetical tenant must incur in order to earn the profits (if any) chargeable with excess profits duty, and that therefore no deduction could be made for excess profits duty

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before the said rent was fixed; and or because it was not a deduction proper to be made or taken into account in arriving at the rent the said hypothetical tenant would pay.

The quarter sessions in giving judgment on the said appeal fixed the gross estimated rental of the Port Authority's undertaking in the parish of Chadwell St. Mary at 106,863*l.*, and the rateable value thereof at 52,063*l.*, and stated that the Court had accepted the contention that a hypothetical tenant would take into consideration the liability to excess profits duty. The appeal to quarter sessions was accordingly allowed subject to the opinion of the High Court on this case.

The question for the opinion of the Court was whether the quarter sessions were right and not acting contrary to law in taking into account excess profits duty in arriving at the rateable value of the hereditament rated. (1)

Colefax K.C. and *Jeeves* for the Orsett Union Assessment Committee. The quarter sessions were wrong in taking into account the liability of the Port Authority to pay excess profits duty, even if it were admitted that that liability exists. For the purpose of rating such a hereditament as a dock you have to consider what is the profit-earning capacity of the hereditament, not what is the profit that the occupier will be able to put into his own pocket. What becomes of the profits after they have been earned is quite immaterial for this purpose. The fact that the occupier has to pay a portion of the profits to the State does not make it any more a proper subject for deduction than if he had to pay it to his wife under a covenant in a settlement. It is clear on the authorities that

(1) A further point was raised by the appellants before the quarter sessions, that in estimating the rent which any hypothetical tenant of the Tilbury Docks might reasonably be expected to pay for the docks an allowance must be made out of the receipts therefrom for such hypothetical tenant's profit which he must be assumed to receive for himself as an inducement to give the hypothetical tenant's rent. The quarter sessions decided against the appellants on that point, and left the question whether they were right in so deciding as one of the questions for the opinion of the Court. The point was formally taken by the appellants before the Divisional Court with a view to a further appeal, but not argued, as the matter was concluded in that Court by *Mersey Docks* v. *Liverpool Overseers* (1873) L. R. 9 Q. B. 84.

in the computation of the profits of a business the liability to pay income tax cannot be taken into account. Of that *Attorney-General* v. *Ashton Gas Co.* (1) is an illustration. There a gas company were empowered to pay a dividend up to 10 per cent., and the question was whether they might pay a 10 per cent. dividend free of income tax. It was held that they could not, for that in so doing they would be paying more than 10 per cent. But little, if any, distinction can be drawn in this respect between income tax and excess profits duty. In *Hollins & Co.* v. *Paget* (2) the manager of a business was by agreement entitled to a commission on a certain portion of the profits of the business, and the question was whether in computing those profits the excess profits duty might be first deducted. Eve J. held that it could not. "It is," he said, "in my opinion, a contribution to the Exchequer of a proportion of the company's profits, and for the purposes with which I am dealing stands very much on the same footing as the income tax. It ought not, I think, to be deducted before ascertaining the excess profits on which the defendant's commission is to be calculated." That case was followed in *Thomas* v. *Hamlyn & Co.* (3), where precisely the same question arose. Rowlatt J. said: "It is conceded that income tax could not be deducted in such a case for the plain reason that the percentage is a charge upon profits and income tax is a tax upon profits, and both the percentage and the tax are claims upon the same fund, and both must be paid in full out of that fund. It is contended that the excess profits duty is not income tax; but, except that there are variations in the method of computation, I cannot see what else it is but an income tax." *Fellows, Ld.* v. *Corker* (4) was another case of commission to be paid upon profits, and there again it was held that excess profits duty could not be deducted. On the other hand, in *Collins* v. *Sedgwick* (5), where under the articles of a private company the shares were only to be sold at a price based on a three years' aggregate of the sums which would have been paid as dividend "if in respect of each of such three

(1) [1906] A. C. 10.
(2) [1917] 1 Ch. 187, 192.
(3) [1917] 1 K. B. 527, 530.
(4) [1918] 1 Ch. 9.
(5) [1917] 1 Ch. 179.

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years there had been distributed among the members the entire profits of such year available for distribution as dividend," it was held by Peterson J. that excess profits duty must be deducted before the entire profits available for distribution as dividend could be ascertained. But that case went on the ground that the duty was payable by the company and not by the shareholders, in that respect differing from income tax. In *In re Condran* (1) the same judge had to deal with an agreement for the sale of a business, part of the consideration for which was to be paid by "one equal third part of the nett profits," and he held that the excess profits duty must be deducted before the profits which were divisible were ascertained, for otherwise the vendor would get more than one equal third part. Those two cases are distinguishable. It is true that s. 35, sub-s. 1 of the Finance (No. 2) Act, 1915, provides that "Where any person has paid excess profits duty under this Act the amount so paid shall be allowed as a deduction for the purpose of income tax in computing the profits and gains of the year," and Peterson J. in *In re Condran* (2), referring to that section, said that "excess profits duty is for the purpose of income tax treated as an outgoing of the business which reduces the profits in respect of which income tax is assessable." But he meant thereby that it was an outgoing for that purpose only, and not for any other purpose. The fact that the Legislature thought it necessary to enact that provision suggests that, but for it, excess profits duty would not be treated as an outgoing even for the purpose of income tax. You must arrive at the hypothetical tenant's rent before you can get at any profits at all, and the profits must be ascertained before the question of excess profits duty can arise. The profits of a business are not what remains after excess profits duty has been paid. But further, apart from the above stated general principle, there are special reasons why in this case excess profits duty should not be treated as a deduction. The liability to pay it was disputed (mainly on the ground that the Port Authority are not traders), and it may be that it will never be payable at all. And secondly, this duty is only

(1) [1917] 1 Ch. 639. (2) [1917] 1 Ch. 644.

payable on the profits of the undertaking as a whole, whereas the subject-matter of the assessment to the poor rate is a portion of the Tilbury Dock, which is only one out of several docks belonging to the undertaking. There were excess profits earned by the Tilbury Dock, but there is no evidence what, if any, excess profits were earned by the whole undertaking.

Talbot K.C., *Ryde K.C.* and *Fortune* for the Port Authority. With reference to the point taken on behalf of the Assessment Committee that the question of the Port Authority's liability to excess profits duty is still under appeal to the Special Commissioners, it is contended that it is not necessary for this Court to find that the liability to that duty in fact exists. It is enough that the quarter sessions were satisfied that the risk of the Port Authority turning out to be wrong in that appeal was one which the hypothetical tenant would take into consideration when calculating what rent he could afford to pay. It was contended on the other side that excess profits duty stood on much the same footing as income tax, and that as income tax was admittedly not allowable as a deduction in arriving at the profits of a concern neither was excess profits duty. But there is this vital distinction between the two, that, whatever the source of the income may be, income tax attaches, and that the subject cannot escape payment of it by changing his investment, whereas he can always avoid excess profits duty by refusing to embark in a business which would render him liable to it. Excess profits duty is a special tax upon a special thing. The contention that the hypothetical tenant will fix the rent of the hereditament before arriving at the profits is a fallacious inversion of the facts. It is obviously necessary to make a computation of the profits before the rent can be settled, for it is upon those profits that the amount of the rent that the tenant can afford to pay depends. The cases cited merely go to show that the expression "profits" may be construed differently according to the subject-matter with which the instrument in the particular case is dealing. Three of those cases, *Hollins & Co.* v. *Paget* (1), *Thomas* v. *Hamlyn & Co.* (2), and *Fellows, Ld.* v.

(1) [1917] 1 Ch. 187. (2) [1917] 1 K. B. 527.

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Corker (1), are cases of agreements to remunerate managers of businesses by a commission on the profits; and it is only a reasonable construction that "profits" there should mean the total profits, including the portion that will eventually have to be paid away as duty, and that the manager should not get less remuneration because out of the profits which his exertions have created the employers will have to pay a portion to the Government. In *Cartwright* v. *Sculcoates Union* (2) Lord Halsbury said that for the solution of the problem of what a tenant from year to year might reasonably be expected to give as rent, "all that could reasonably affect the mind of the intending tenant ought to be considered"; and amongst the matters which would reasonably affect his mind is the liability, or risk of liability, to pay excess profits duty. In truth the question of what the hypothetical tenant would pay is, as Lord Macnaghten said in the same case when on appeal to the House of Lords (3), "a question of common sense, and not a question of law. It is a question of common sense in the application of the plain language of the Act of Parliament." In *Rex* v. *Shoreditch Assessment Committee* (4) it was held that the fact of a heavy increase in the duty imposed on licensed premises by the Finance (1909-10) Act, 1910, was a matter which would affect the mind of the intending tenant of a public-house. The only distinction between that case and the present is that there the duty had to be paid before the profits could be earned, whereas here the order of things is reversed. But the effect of the duty on the tenant's pocket would be precisely the same in both cases, and he would take it into consideration when computing the rent just as much in the one case as in the other.

Jeeves replied.

DARLING J. Sect. 1 of the Parochial Assessment Act, 1836, provides that "No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to

(1) [1918] 1 Ch. 9.
(2) [1899] 1 Q. B. 667, 673.
(3) [1900] A. C. 150, 153.
(4) [1910] 2 K. B. 859.

say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent charge, if any," and for the purpose of arriving at the rent which the hypothetical tenant under that statute would pay for the hereditament to be rated, as was said by Lord Halsbury in *Cartwright* v. *Sculcoates Union* (1), "all that could reasonably affect the mind of the intending tenant ought to be considered." Now here we have to assume a tenant who proposes to rent the Tilbury Dock, not as a public benefactor, but as a business man, with the intention of making a profit out of it. What is he entitled to take into consideration when fixing the rent which he can afford to pay? There appear to be a good many decisions that he is not entitled to consider the income tax which he would have to pay on the profits of the undertaking, but there are, I think, no cases which say that he may not take into consideration the liability to pay excess profits duty, nor can I see any reason why it should not be allowed as a deduction. The Act expressly provides that he may consider the tithe commutation rent charge, but what distinction in principle can be drawn between excess profits duty and tithe? Suppose a man is contemplating taking a farm which is capable of producing a thousand bushels of corn. Under the old system he would know that the Church would come and take a hundred bushels out of the thousand, and he might take that into consideration when considering the rent that he would give for the farm, and the statute in substance provides for his being rated not on the thousand bushels but on the nine hundred which the Church has left him. In my opinion the intending tenant of a dock must equally be entitled to consider how far his profits may be reduced by his having to pay excess profits duty. As I have already said, there are apparently no cases which conflict with this view, while there is a passage in the judgment of Peterson J. in *In re Condran* (2) which supports it. He there says, referring to s. 35 of the Finance (No. 2) Act, 1915: "Excess profits duty is for the purpose of income tax treated as an outgoing of the business which reduces the profits in respect

(1) [1899] 1 Q. B. 667. (2) [1917] 1 Ch. 639, 644.

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of which income tax is assessable." But if it is an outgoing of the business for the purpose of income tax, why is it not an outgoing of the business which reduces the profits for other purposes, just as the taking of tithe from the profits of a farm reduces the profits of the farmer? One other case I will refer to, *Rex* v. *Shoreditch Assessment Committee*. (1) There the licence duty upon a public-house in the metropolis having been raised under the provisions of the Finance (1909-10) Act, 1910, from 35*l*. to 130*l*., the question was whether that fact was not prima facie evidence of a reduction in the rateable value of the house. Cozens-Hardy M.R. said: "The hypothetical tenant would certainly be less willing to pay the old rent if he knew that an inevitable—not an optional—deduction of 95*l*. a year from the profits would in future have to be made." If a deduction in such a case was to be allowed because of the increase in the licence duty it ought equally to be allowed in the case of excess profits duty. The hypothetical tenant would take the one into consideration just as much as the other. I am of opinion that the court of quarter sessions was right, and that the appeal should be dismissed.

LORD COLERIDGE J. The hypothetical tenant has to calculate what rent he can afford to pay after discharging tenant's rates, taxes, and tithe commutation rent charge. For the purpose of that calculation he must estimate the profits which he would make from the tenancy, and if the Government will absorb a large percentage of those profits that fact must surely affect the calculation. If you are entitled to look at the profits in order to estimate the rent you are surely entitled to consider the fact that the profits may be diminished by the excess profits duty. I agree that the appeal should be dismissed.

AVORY J. The question on this appeal is whether the quarter sessions "were right and not acting contrary to law in taking into account excess profits duty in arriving at the rateable value of the hereditaments rated." Unless this Court is prepared to say that they were acting contrary to law in so

(1) [1910] 2 K. B. 876.

doing this appeal of the respondents must fail. That that duty may be taken into account in order to ascertain the rent which the hypothetical tenant would probably give for the occupation of the premises is, in my opinion, clear beyond doubt. The hypothetical tenant, who is subject to the duty in question, knows that he will not put into his pocket the whole of the profits which may be earned, but that so far as those profits exceed the pre-war standard a certain percentage—60 or 80 per cent. as the case may be—will have to be handed over to the Government. Under those circumstances it is obvious, as a matter of common sense, that a tenant will not give so much rent for the premises as he would if he were going to retain the whole of the profits for his own use. In addition to the quotation which my Lord has made from the judgment of Cozens-Hardy M.R. in *Rex* v. *Shoreditch Assessment Committee* (1), I should like to call attention to what was said by Blackburn J. in *Mersey Docks* v. *Liverpool Overseers.* (2) "Where the hereditaments are not in practice let the problem becomes more difficult." That is the present case. It is not a case where the premises could be let in the ordinary course. The only possible tenant is, in fact, the owner, the Port Authority. "The facts and circumstances, which would be taken into consideration by those who in the case of a real tenancy do in the higgling of the market fix the rent, are to be taken into consideration, and on a view of all those the net annual value of the occupation is to be determined; and in many cases the amount that is made by the trade carried on by the occupier's occupation, less an allowance for the profits which the tenant might elsewhere make by his trade, is an important element in the evidence of the annual value. . . . . If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business,"—which is the present case—"that facility does, beyond all question, enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element,

(1) [1910] 2 K. B. 876. (2) L. R. 9 Q. B. 84, 96.

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except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business." The question therefore is: What evidence is afforded in this case of the amount which might reasonably be expected to be made from the occupation? The evidence before the quarter sessions shows that the whole of the profits which it is alleged had been earned in the year 1916 had not, in fact, gone, and could not go, into the appellants' pocket, but, so far as the excess profits were concerned, only some 40 or 20 per cent. of the excess.

There is one other point to which I desire to refer. Sect. 38, sub-s. 3, of the Finance (No. 2) Act, 1915, provides that "Where a person proves that in any accounting period, which ended after the 4th day of August, 1914, his profits have not reached the point which involves liability to excess profits duty, or that he has sustained a loss in his trade or business, he shall be entitled to repayment of such amount paid by him as excess profits duty in respect of any previous accounting period, or to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period." It is suggested that if the deduction here claimed on account of excess profits duty is made, and it should afterwards turn out that the tenant gets a repayment under the section, an injustice will have been done. It seems to me that that is no argument for holding that a tenant will pay the same rent for a business of which he is only going to get a certain proportion of the profits as he would for a business of which he is going to get the whole.

With reference to the other cases that have been cited I would only add that they are all, in my opinion, decisions upon particular agreements or particular words of the Statute that was then in question, and that a provision of a Finance Act is of no assistance to the Court in determining a rating question, because Finance Acts are passed for the purpose of raising

revenue, and sometimes provisions are put in to mitigate the hardship that arises from their imposition. I agree that the appeal should be dismissed.

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Appeal dismissed.

Solicitors for the Port of London Authority: *E. F. Turner & Sons.*

Solicitors for the Assessment Committee: *Hatten & Asplin.*

J. F. C.

SMEDLEY *v.* REGISTRAR OF COMPANIES.

1918
Nov. 14.

Company—Annual General Meeting—Omission to hold within Time Limited —At what Date Default Committed—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 64.

By s. 64 of the Companies (Consolidation) Act, 1908, "A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting," and if not so held every director who is knowingly party to the default shall be liable to a penalty.

On June 18, 1918, an information was laid under that section against a director of a company for not holding a general meeting in the calendar year 1917. The last general meeting of the company was held on March 21, 1916.

Held (by Darling and Lord Coleridge JJ., Avory J. dissenting), that the information was in time as having been laid within six months after the commission of the offence; that the section created two separate offences, that of not holding the meeting in the calendar year, and that of not holding it within fifteen months after the last meeting; that the directors had the whole of the calendar year in which to comply with the former requirement none the less because the period of fifteen months from the date of the last meeting had already expired; and that the offence charged in the information was not committed until after December 31, 1917.

CASE stated by a Metropolitan police magistrate.

On June 18, 1918, an information was laid on behalf of the Registrar of Companies against the appellant, W. F. Smedley, charging that he being a director of the Lyceum Club International, Limited, a company registered under the Companies Acts, 1862 to 1900, was, on December 31, 1917, knowingly

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party to the default of the said company in not holding a general meeting in the calendar year 1917, contrary to s. 64 of the Companies (Consolidation) Act, 1908.

At the hearing the following facts were proved :—

The company was registered on February 24, 1906. An annual general meeting was held on March 21, 1916. No general meeting was held subsequently up to the time of laying the information. On the part of the appellant it was contended that the proceedings were bad in law owing to the information not having been laid within six months after the commission of the alleged offence as required by s. 11 of the Summary Jurisdiction Act, 1848. The magistrate held that the information was laid within six months after the offence, and convicted the appellant.

Patrick Hastings for the appellant. The offence charged in the information was committed on June 22, 1917, and not at a later date. If that view is correct the information was out of time. The meaning of s. 64 of the Act of 1908 is clear when it is contrasted with the corresponding section, s. 49, of the Companies Act, 1862, now repealed. That section provided that "a general meeting of every company under this Act shall be held once at the least in every year," a provision which would be complied with by holding the meeting in one year at the beginning of January, and in the next year at the end of December after an interval of practically two years. That section was amended by s. 24 of the Companies Act, 1907 (7 Edw. 7, c. 50), in terms identical with those now re-enacted in s. 64 of the present Act. The object of the amendment was to prevent so long an interval being allowed between the holding of the two meetings. Its meaning is that if the general meeting is held in the first of two consecutive years at such a date, that more than fifteen months will elapse before the end of the following year, the meeting in that second year must be held within the fifteen months, and if the meeting is not so held within the fifteen months the offence, and the only offence created by the section, is complete on the expiry of that period. After that date it is too late to comply with the

section, and consequently impossible to commit any further offence.

B. W. Ginsberg for the respondent. It is admitted that s. 64 does not make the neglect to hold a general meeting a continuing offence de die in diem, but it creates two separate and distinct offences :—(1.) that of not holding a meeting in the calendar year, and (2.) that of not holding it within fifteen months after the last preceding meeting. The former offence, which was the one charged against the appellant, could not be committed until after December 31, 1917, as the company had the whole year in which to comply with the section. The information, having been laid within six months from that date, was in time.

Hastings replied.

AVORY J. I regret that there should be a difference of opinion in this case, but I cannot persuade myself to agree with the majority of the Court that the decision of the magistrate was right. That decision can be supported only upon the ground that s. 64 of the Companies (Consolidation) Act creates two distinct offences : (1.) a default in holding a meeting of the company in each calendar year, and (2.) a default in holding it within fifteen months of the holding of the last preceding general meeting. With all respect I do not think that this section does create two such different offences. It is in my view important to look at the legislation preceding this Consolidation Act of 1908. In the Act of 1862 it was provided by s. 49 that a general meeting should be held once at least in every calendar year, and no doubt the result of that was that an interval of two years all but one day might elapse between the general meetings of the company. The Companies Acts of 1867 and 1900 do not appear to touch the point which is now in question, but by the Act of 1907 a provision was enacted in the same terms as s. 64 of the present Act, and s. 49 of the Act of 1862 was repealed. Looking at the words of that section it appears to me clear that the default contemplated by the section is made when the company fails to hold its meeting within that portion of the

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next current year which is within fifteen months after the date of the last preceding meeting. Taking the present case, and not going outside it for an illustration, the last meeting having been held on March 21, 1916, it was necessary that a meeting should be held in 1917, and in that portion of that year which was within fifteen months after March 21, 1916, that is to say, it was required to be held not later than June 21, 1917. As soon as that day was passed there was a default, and liability to the penalty imposed by the statute. But by the provisions of the Summary Jurisdiction Act proceedings for the recovery of that penalty must be taken within six months from the commission of the offence. And it is conceded in the present case that if the offence was committed on June 22, the information was not laid in time. The only way of meeting that difficulty is by saying either that the offence is a continuing one, which is not now contended for, or that a separate offence was committed by reason of the fact that a meeting was not held in the calendar year 1917. But if it was a separate offence, then it follows that for the neglect to hold a meeting in 1917 there might be two prosecutions : one for not holding it within the portion of that year which fell within the fifteen months, and another for not holding it before the end of the last day of December. It cannot be that such a double prosecution was contemplated by the legislature. In my view, as I have said, there was but one offence. That offence was complete on June 22, and no further offence could be committed in the later portion of the year. Therefore in my opinion the magistrate was wrong, and he ought to have held that the proceedings were out of time.

LORD COLERIDGE J. The question in this case is whether the magistrate was right in holding that an offence had been committed on the date specified in the information, December 31, 1917, and that consequently the information was laid within six months of the matter arising. There is no doubt that on June 22, 1917, on the expiry of the fifteen months, without a meeting having been held for the year 1917, an offence had been committed, but as the information was

not laid till more than six months after that date there could be no conviction for that offence. But the question with which we are concerned is whether on December 31, 1917, the date charged in the information, another offence had not been committed. It is clear that the appellant had not summoned a meeting within the calendar year 1917. But it appears to me that he was entitled to say that he had the whole of the calendar year up to December 31 in which to comply with that requirement, and that until the whole year had expired he could not be summoned for non-compliance. In my opinion s. 64 contains two separate and distinct requirements, and that it can be no answer to a prosecution for a breach of one of those requirements that he had already committed a breach of the other. I think that the appellant committed an offence on the date charged in the information, and that the information was consequently laid in time. I should add that Darling J. concurs in this judgment.

Appeal dismissed.

Solicitor for appellant: *F. P. Woodcock.*
Solicitor for respondent: *Solicitor to the Board of Trade.*

J. F. C.

1918
Oct. 22.

JACKSON, APPELLANT *v.* ROTH AND OTHERS, RESPONDENTS.

Gaming—Place used for Betting—Club—Bets made between Members only —Members acting as Bookmakers—Betting with Persons resorting thereto —Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1, 3.

Where a portion of club premises is kept and used for the purpose of betting, all the facilities for carrying on a betting business being provided, to which place certain members of the club habitually resort, having particular places or pitches where they can be found, in order to carry on a betting business by laying odds against horses running in horse races with any member of the club that chooses to back them, the fact that the club is a bona fide social club, and that all the persons betting are members of the club, will not preclude proceedings being taken for an offence under ss. 1 and 3 of the Betting Act, 1853.

Downes v. *Johnson* [1895] 2 Q. B. 203 distinguished.

CASE stated by a Metropolitan police magistrate.

The eleven respondents and 44 other persons were arrested at the premises of the Coventry Club, 21, Denman Street, Piccadilly, on July 5, 1918, by the appellant, Chief Inspector Thomas Jackson, and other officers of the Metropolitan Police Force by virtue of a search warrant issued under s. 11 of the Betting Act, 1853. All the persons so arrested with the exception of the 11 respondents were on July 6 bound over in their own recognisances not to haunt or frequent betting houses for the next twelve months. The charges in the summonses preferred against the respondents (which were all framed under ss. 1 and 3 of the Betting Act, 1853) (1) were as follows :

(1) Betting Act, 1853, s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; . . . ."

Sect. 3: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction," be liable to a penalty.

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(*a*) A charge against the respondent Roth alleging that he on various dates between July 2 and 5, 1918, being the occupier of the Coventry Club, did keep and use a certain room in the basement of the premises for the purpose of betting with persons resorting thereto.

(*b*) A second charge against the same respondent alleging that he on the said dates being the occupier of the said premises, did unlawfully and wilfully permit the said room to be kept and used for the purposes aforesaid.

(*c*) A third charge against the same respondent alleging that he on the said dates had the management and care of the premises which were then being used for the purposes aforesaid.

(*d*) A charge against the respondent Cherer alleging that he on the said dates did assist in conducting the business of the said premises which were then being used for the purposes aforesaid.

(*e*) A joint charge against the respondents Ayton and Costerton alleging that they on the said dates being persons using a room in the basement of the said premises did use the same room for the purpose of betting with persons resorting thereto.

(*f*) A charge against the respondent Israel alleging that he on the said dates being a person using a room in the basement of the said premises did use the room for the purposes aforesaid.

(*g*) A charge similar to (*f*) against the respondent Motrou.

(*h*) A charge similar to (*f*) against the respondent Spence.

(*j*) A joint charge similar to (*e*) against the respondents Levy and Alvarez.

(*k*) A joint charge similar to (*e*) against the respondents Austin and Jaffe.

The respondent Roth pleaded guilty to the charge (*c*). Charges (*a*) and (*b*) were thereupon withdrawn by the prosecution. The respondent Cherer pleaded guilty to the charge (*d*). The other respondents pleaded not guilty.

Upon the hearing of the charges on July 15, 1918, the following facts were proved or admitted.

The Coventry Club had been in existence about 11 years, and was duly registered under the provisions of the Licensing

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Acts, 1902 and 1910. It had a membership of about 500. The members appeared to be persons of means. The club was situate on the ground floor and in the basement of 21, Denman Street, Piccadilly, the upper part of the premises being devoted to residential purposes where some members of the club lived. The rooms on the ground floor were three—an office, a card or reading-room, and a dining-room. In the basement there was a very large room which was fitted up with a full-sized billiard table, some 16 small tables with drawers, and a number of chairs and settees. In this room was a telephone call box, 2 telephones on one of the tables, a tape machine, and a notice board for the posting of tapes thereon. It was in this room that the incidents occurred which, according to the contentions of the prosecution, constituted this room in law a betting house.

The respondent Roth was the lessee of the premises and the manager and registered secretary of the club, and was responsible for the general conduct and management of the club. He was seen at the club on July 2-5, sometimes at the head of the stairs leading to the basement room, and at other times in the basement room whilst betting was going on looking at the tape machine, but he was in the dining-room when the police entered the club on July 5. The magistrate was satisfied that he knew that betting as hereinafter described was going on in the basement room and acquiesced in it.

The respondent Cherer had been a member of the club for some years. His occupation at the club was to attend to the tape machine in the basement room. When arrested on July 5 he said: "I attend to this tape. I don't get paid. I do it voluntarily." He called out the racing news which came up on the tape machine, such as the names of starters, the odds, and the winners, etc.

The respondents Ayton, Israel, Motrou, Spence, Levy and Austin described themselves as turf commission agents, and upon the occasion in question they appeared to be acting as professional bookmakers. The respondents Costerton, Alvarez and Jaffe upon such occasions acted as clerks to Ayton, Levy and Austin respectively. These 9 respondents were members of the club, and in fact 51 out of the 55 persons arrested by

the police were members of the club. No point was made by the prosecution as to 4 persons being found in the basement room who were not members of the club, the appellant stating that he understood no strangers were knowingly admitted to that room.

A copy of the rules of the Coventry Club was attached to and formed part of the case. Such rules contained the usual provisions as to election of members, the payment of entrance fees and annual subscriptions, etc. The magistrate was satisfied that the club was a bona fide club, and no attack was made by the prosecution upon its constitution or general conduct apart from the matters which formed the subject of this complaint. There was a hall porter or doorkeeper in attendance at the entrance, and non-members were not knowingly admitted to the club. At the time of the police visit on July 5 some 30 to 40 members were at lunch in the dining-room.

It was proved by two police officers who had visited the premises on July 2, 3 and 4 between 1.30 to 3 o'clock for the purpose of reporting as to what they had observed, that there were 100 to 150 persons daily in the basement room. No billiards were being played. They noticed that the nine respondents (with the exception of Levy, who was only present on July 2 and 5) were present on each visit. The respondents Ayton, Israel, Motrou, Spence and Austin sat at small tables in the room, and appeared to the officers to be sitting at the same tables respectively on each visit. There were others to the number of about 12 present on July 2, 3 and 4, who sat at similar tables, but who were not present on July 5 when the warrant was executed. The five last named respondents, and Levy as regards July 5, and the other persons occupying similar tables, appeared to be acting as bookmakers and taking bets from other persons present in the room. The three respondents Costerton, Alvarez and Jaffe, sat at the tables respectively used by Ayton, Levy and Austin. When a bet was made with or for Ayton, Israel, Motrou, Spence, Levy and Austin, they would enter the bet in their books, and those who had clerks left it to the clerks to enter the particulars. Phrases

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were heard by the officers such as "I'll take any horse." "I'll bet a pony on the field." "I am betting on the 2.30." "I'll lay the field a pony," etc., shouted by the said bookmakers.

On July 3 the respondent Ayton was at the same table as on July 2. A man gave him some Treasury notes and said "20*l.* Beckhampton," which bet was taken, Costerton acting as Ayton's clerk and entering the bet. On July 4 Ayton was at the same table. A man made a bet of 1*l.* on "Borough Bridge" with him. Costerton again recorded it as his clerk. On July 5 Ayton with Costerton was at this table. A man handed Ayton a Treasury note for 10*s.* just as the police entered. Some one called out "Look out! No 'ready.'" On Ayton was found 38*l.* 2*s.* 6*d.*, and the police found in the drawer of the table where he had sat some particulars as to terms of betting business and a betting book.

On July 2 the respondent Israel was seated at a table on the left of the basement room. He called, "Any more want to back 'Rocksavage'?" A man went up to him and said, "I'll have a pound on 'Rocksavage.'" Israel said, "Name, sir?" The man gave Israel a 1*l.* note, and an entry was made in Israel's book. Another man went up to Israel and said, "There's 4*l.* 10*s.* to come." On July 4 Israel was shouting, "I'll lay the field a pony." A man made a bet with him on "Borough Bridge." He was also heard to mention that "odds were on" when a horse named "Jutland" won. On July 5, on the execution of the warrant, Israel was sitting at the same or a similar table calling out "Odds on." He had a number of Treasury notes in his hand, which he put into his pocket on the arrival of the police. He was found to have 60*l.* on him, and a betting book was lying before him on the table. In the drawer of his table were a number of documents all relating to betting matters.

On July 4 the respondent Motrou took a bet "5*s.* to win, 'Kaffir King.'" He had no clerk, and entered the bet himself; and it was noticed that in respect of that bet he took silver out of the drawer to pay to the winner when "Kaffir King" was announced on the tape machine as the winner. The other respondents who were acting as bookmakers simi-

larly paid out in cash or Treasury notes to the winners who had made bets with them. Motrou used to sit at one of the small tables, and was found on July 5 with several betting books on the table in front of him, whilst in his possession were 11*l.* in notes and 38*s.* 6*d.* in silver.

The respondent Spence sat at one of the small tables. He was heard to say, "I pay over paper money." He was found on July 5 sitting at this table with betting sheets in front of him, whilst on him was a sum of about 65*l.*

Levy was present in the basement room at a table on July 2 accompanied by Alvarez, who acted as his clerk. He was not seen on July 3 or 4, but the officers heard some conversation about his being ill. Alvarez was present on those days using the same table. On July 5 on the entry of the police Alvarez was seated at the same table. He was shortly afterwards joined by Levy, who sat by him with a betting book in front of him, to which he referred on being spoken to by one of the persons present, saying, "There you are. It's 1*l.* 12*s.* 6*d.* right enough, so I owe you 2*s.*," and he handed 2*s.* over to that person. To the police Levy said, "I have just come down from my lunch to speak to him" (meaning Alvarez). Alvarez in Levy's presence said, "I am not a bookie. Levy's the bookie. I am his clerk." To which Levy said nothing. On Levy was about 30*l.*, on Alvarez about 106*l.*

The respondent Austin on July 2, 3 and 4 was sitting at the first table in the basement room accompanied by Jaffe, who acted as his clerk. On July 3 a man went to Austin, bet him 5*l.*, and said, "'Lightly,' a fiver." An entry was made by the clerk Jaffe. On July 5 Austin went to the table where his clerk Jaffe then was sitting with betting books and memoranda in front of him. His clerk was heard to say to a man who came up, "I can't pay now; I'm busy." On Austin was found 130*l.*, and when asked why he carried so much money he said, "Well, they don't like cheques, you know." On Jaffe was found 11*l.* 7*s.* 6*d.*

There were several documents found by the police relating to betting in the basement room in addition to those in the possession of one or other of the respondents.

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In opening the case the solicitor for the prosecution referred to *Downes* v. *Johnson* (1); *Brown* v. *Patch* (2); *Rex* v. *Corrie and Watson* (3); *Rex* v. *Bradley, Fleming and Lanceley* (4); *Rex* v. *Hitchin and Fleming* (5); *Rex* v. *Fisher, Fisher and Grout* (6); all of which the magistrate considered as well as *Oldham* v. *Ramsden* (7) and *Reg.* v. *Cook.* (8) In the course of his address on July 15, 1918, the solicitor for the prosecution also referred to *Jenks* v. *Turpin.* (9)

It was contended for the prosecution that it was immaterial in law whether the Coventry Club was a bona fide club if (whilst it might have had bona fide features of a club such as dining-room, etc.) there was any part of the club premises set apart and recognized as a part in which bookmakers, being members of the club, customarily assembled, using particular places, such as tables and chairs, for the purpose of there conducting their business as bookmakers by betting with other persons who might have resorted to the premises as members not only to enjoy the amenities of the club but also to meet such bookmakers and there bet with them. And further, that it was immaterial whether the bookmakers or the persons betting with them were members of the club. It was further submitted that if bookmakers became members of a club in order to get facilities to carry on their business in the club premises with other members resorting thereto the Betting Act, 1853, applied. It was submitted also on the facts of the case that in the Coventry Club there were two sets of members consisting of bookmakers using it for their business and ordinary members, just as in *Rex* v. *Corrie and Watson* (3). And that the facts showed that the bets were not mere incidental bets made by one member with another as in *Downes* v. *Johnson* (1), but that the bookmakers had suitable tables at which they were accustomed to sit, and that there was a definite localisation in the basement room of the Coventry Club for the transaction of the ordinary business of a bookmaker, just as on a race-

(1) [1895] 2 Q. B. 203.
(2) [1899] 1 Q. B. 892.
(3) (1904) 68 J. P. 294.
(4) (1908) 1 Cr. App. R. 146.
(5) (1908) 1 Cr. App. R. 161.
(6) (1913) 9 Cr. App. R. 164.
(7) (1875) 44 L. J. (C. P.) 309
(8) (1884) 13 Q. B. D. 377.
(9) (1884) 13 Q. B. D. 505

course, with any member of the club who might choose to come and make bets with them, a position which the solicitor for the prosecution said was dealt with in *Brown* v. *Patch* (1), considered and approved in *Rex* v. *Deaville*. (2)

The magistrate did not call for any argument upon the case from the advocates for the respondents, but the counsel who represented all the respondents other than Roth, Cherer, Austin and Jaffe stated that he relied on *Downes* v. *Johnson*. (3) After the magistrate had given his decision counsel stated that he desired to refer to *Powell* v. *Kempton Park Racecourse Co.* (4) and to the judgment of The Earl of Halsbury therein, and said that he should, if necessary, have argued that as Roth was not carrying on the business of betting the respondents could not be convicted. The magistrate did not hear any argument upon this contention as he deemed it unnecessary having regard to the decision he had already arrived at.

The magistrate held that upon the facts which had been proved or admitted as hereinbefore mentioned the prosecution had not made out any case in law of any of the offences charged, and that there was no evidence of any of such offences as were charged in the summonses. He was of opinion that the facts of this case were not distinguishable from those in *Downes* v. *Johnson* (3), a decision upon which no doubt had ever been cast. He referred to the words of the title and preamble of the Betting Act, 1853, as showing that in his opinion the Act could never have been intended to apply to such a state of facts as existed here. He was of opinion that the members of a bona fide club, which he held the Coventry Club to be, betting inter se in one of the club rooms could not be said to be " persons resorting to the said premises " within the meaning of those words in ss. 1 and 3 of the Betting Act, 1853, and that it was immaterial that some of such members were turf commission agents or bookmakers. The magistrate therefore dismissed the summonses against all the respondents, ignoring the pleas of Roth and Cherer.

(1) [1899] 1 Q. B. 892.
(2) [1903] 1 K. B. 468.
(3) [1895] 2 Q. B. 203
(4) [1899] A. C. 143.

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The question for the opinion of the Court was whether the magistrate upon the above statement of facts came to a correct decision in point of law.

Sir Archibald Bodkin and *Roome* for the appellant. The preamble to the Betting Act, 1853, upon which the magistrate relied was repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19). There was evidence that the basement room of the club was a place used for the purpose of betting within the meaning of the Betting Act, 1853, as construed in *Powell* v. *Kempton Park Racecourse Co.* (1) Lord James of Hereford in that case said (2): "directly a definite localisation of the business of betting is effected, be it under a tent or even movable umbrella, it may be well held that a 'place' exists for the purposes of a conviction under the Act"; and Lord Halsbury, L.C., said (3) that: "any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the statute." What is aimed at by the statute is the localisation of betting; it is "directed against betting places, not against betting persons": *Brown* v. *Patch.* (4) The basement room in the present case was a place where the business of betting was localised, the bookmakers sitting at the same tables. It is not necessary, in order to constitute the offence, that the whole of the club premises should be used for the purpose of betting; it is sufficient if a part of the club premises is used in that way, and it is immaterial that the rest of the club premises is used for the ordinary amenities of a club. It is not necessary that the place should be localised with precise definiteness in order to satisfy the statute. In *Belton* v. *Busby* (5) and in *Rex* v. *Deaville* (6) it was held that where a bookmaker was in the habit of frequenting the bar of a public-house for the purpose of betting with persons resorting thereto to the knowledge and with the permission of the occupier of the house, he was using the bar for betting within the meaning of the Betting Act. Although it is not an offence for members of a club incidentally

(1) [1899] A. C. 143.
(2) Ibid. 194.
(3) Ibid. 162.
(4) [1899] 1 Q. B. 898
(5) [1899] 2 Q. B. 380.
(6) [1903] 1 K. B. 468.

to make bets between themselves, yet if there is in the club a place where the business of betting is localised, the fact that all the persons betting are members of the club will not prevent the house being kept for the purpose of gaming. It is clear that a club which is a bona fide club may yet have another character. Hawkins J., in *Jenks* v. *Turpin* (1), after pointing out that the house was really opened and kept for the purpose of gaming, added, that " if the house had been kept open for a double purpose, viz., as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept 'for the purpose of gaming.'" In *Rex* v. *Corrie and Watson* (2) it was held that the club was formed for two purposes, as a social club and as a place where members could bet. There was evidence that the members did not bet indiscriminately with one another but were divided into two classes—the two defendants who were bookmakers and who sat at the same tables and the rest of the members who betted with them—and in those circumstances the two defendants were properly convicted of offence under the Betting Act. In *Rex* v. *Bradley, Fleming and Lanceley* (3) the betting also took place on club premises, and the Court of Criminal Appeal held that as one of the purposes of the club was betting, it was a question for the jury whether or not the room was being used by the defendants for the purpose of betting with persons resorting thereto. There is an essential distinction between the facts in *Downes* v. *Johnson* (4), upon which case the magistrate relied, and the facts in the present case. According to the findings of fact in that case individual members had no prescribed places or " pitches " in the club room, and there was no member who could be accurately described as holding " a bag against all comers." Certain of the members usually laid odds against horses running in horse races, and certain others of the members usually backed horses so running, but frequently those respective positions were reversed. There was no finding that the persons were carrying on the business of bookmakers.

(1) 13 Q. B. D. 512.
(2) 68 J. P. 294.
(3) 1 Cr. App. R. 146.
(4) [1895] 2 Q. B. 203.

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In the present case six of the respondents, three of whom had clerks, always sat at the same tables and always laid odds against the horses running; they were in fact carrying on a betting business. *Oldham* v. *Ramsden* (1) is no authority here. In that case there was no evidence to show that the place in which the bets were made was a place kept and used for the purpose of betting with persons resorting thereto. [*Reg.* v. *Cook* (2) was also referred to.]

Zeffert for all the respondents except Roth and Cherer. The magistrate was justified in drawing the inference from the facts that the club was a bona fide club, and that the betting was merely incidental betting by members of the club and not betting carried on as a business, and that therefore no offence had been committed under the Betting Act, 1853. As was pointed out by Lord James of Hereford in *Powell* v. *Kempton Park Racecourse Co.* (3), "betting is not illegal in itself, and the statute never intended to make it so. It is only the opening, keeping, or using of a place for the carrying on of a betting business that is illegal." There is nothing illegal in betting in a club, or in going to a club for the purpose of betting, so long as a betting business is not being carried on there. In the present case the magistrate has not found that a betting business was being carried on at the club. It was the presence of betting men in the room which afforded the opportunity of betting, and not the fact that it was a place where a betting business was being carried on. In *Rex* v. *Corrie and Watson* (4) the place where the betting was carried on, though called a club, was not a genuine club. It was held in *Oldham* v. *Ramsden* (1) that the making of bets at a bona fide club does not turn the club into a place kept for the purpose of betting. The facts in the present case are indistinguishable from those in *Downes* v. *Johnson* (5), and the decision in that case applies here. There was no evidence in the present case that the places where the bookmakers sat were localised. It is different from *Brown* v. *Patch* (6), where the bookmaker had a green umbrella.

(1) 44 L. J. (C. P.) 309.
(2) 13 Q. B. D. 377.
(3) [1899] A. C. 196.
(4) 68 J. P. 294.
(5) [1895] 2 Q. B. 203.
(6) [1899] 1 Q. B. 892.

The respondents Roth and Cherer were not represented.

DARLING J. I think this appeal should be allowed. The respondents were summoned for offences against the Betting Act, 1853. The magistrate dismissed the summonses, holding that upon the facts which had been proved or admitted before him the prosecution had not made out any case in law proving any of the offences charged. No doubt the club was in some sense a social club—as members could lunch or dine there, or play billiards and read books there. But there was also in the basement a regular apparatus, including a tape machine, for carrying on a betting business. Bookmakers went there day after day and sat at tables with their clerks; names of horses were called out, and they laid odds, as bookmakers ordinarily do. The magistrate, having stated these facts in the case, says: "I was of opinion that the facts of this case were not distinguishable from those in *Downes* v. *Johnson* (1), a decision upon which no doubt had ever been cast." I do not agree with him. I think the facts of the present case are clearly distinguishable from those in *Downes* v. *Johnson*. (1) It is obvious that Grantham J., in deciding that case, relied on the preamble to the Betting Act, 1853, which preamble has been repealed. He held that no offence had been committed, as the persons charged were not improvident people, whereas the preamble spoke of improvident people. I think that case is clearly distinguishable; but I will leave it to my brother Avory to state the reason why it is distinguishable. I also think that very considerable doubt has been cast upon the authority of that case by subsequent decisions, and if I had to choose between those decisions and *Downes* v. *Johnson* (1) I should come to the conclusion that *Downes* v. *Johnson* (1) was wrongly decided. The magistrate goes on to say, and this is obviously the ground upon which he dismissed the summonses, "I was of opinion that the members of a bona fide club, which I hold the Coventry Club to be, betting inter se in one of the club rooms could not be said to be persons resorting to the

(1) [1895] 2 Q. B. 203.

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said premises within the meaning of those words in ss. 1 and 3 of the Betting Act, 1853, and that it was immaterial that some of such members were turf commission agents or bookmakers." I think the magistrate was wrong when he says that this was a case of members of a bona fide club betting inter se. If members of a club, which is nothing but a social club, bet with other members of the club, and the betting is merely incidental to their meeting in the club, it is clear from the authorities that no offence would be committed. Hawkins J., however, in *Jenks* v. *Turpin* (1) pointed out " that, if the house had been kept open for a double purpose—viz., as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did—it would none the less be a house opened and kept ' for the purpose of gaming.' " That is a decision absolutely contrary to the view which the magistrate has expressed in the present case. He seems to have thought that if a club is an honest social club there may be apparatus for betting on the club premises, and that bookmakers, so long as they are members of the club, can go there and carry on their business. That is not the law. Even though a club be a bona fide social club, none the less a portion of the club premises may be kept and used for the purposes of betting ; and if that is the case it does not matter whether the people with whom the bets are made are members of the club or bookmakers. In my opinion what was done at this club was an abuse of the rules and objects of a social club in the same sense as it was an abuse of the Temple at Jerusalem to set up " the tables of the money changers, and the seats of them that sold doves." That was no proper part of the use of the Temple. In the same way, nearer our own time, it was an abuse of St. Paul's Cathedral when serjeants-at-law stood, as they did, by pillars in the porch, each serjeant having a particular pillar where he could be found, and where people, ostensibly coming to worship, in reality came to meet some particular serjeant in order to instruct him about cases to be argued, more particularly in the Court of Common

(1) 13 Q. B. D. 512.

Pleas, where serjeants had the exclusive right of audience. St. Paul's was then used for legitimate and illegitimate purposes in the same way as was the Temple at Jerusalem. It is not enough to say that this club was a social club in order to arrive at the conclusion that the members could do what they liked in it. The magistrate must consider whether it was used by the members for the purpose of gaming as well as for the proper purpose of a social club.

There is also the authority of *Rex* v. *Bradley, Fleming and Lanceley* (1), where Pickford J. said: "At any rate, one of the purposes of the club was betting; and as it took place at special hours of the day and there were special facilities for its easy working, it was clearly, on those facts, a question for the jury whether the room was or was not being used for the purpose of Fleming and Lanceley, persons using it 'betting with persons resorting thereto.'" That is the very question which the magistrate ought to have asked himself here, but he declined to do so. He says that the question was concluded by the fact that the club is a social club, and that bookmakers who are members of the club may therefore carry on their business there. In my opinion he has gone wrong in relying on *Downes* v. *Johnson* (2), which does not cover the case, and in declining to take into consideration those points which he ought to have considered, and which I should have thought would have left no doubt in his mind that this place was being used by these bookmakers going to the club to carry on their business, and by members going there to meet them, and that it was kept by Roth and Cherer for that purpose. There was the strongest evidence to show that the club was kept for the purpose of betting, and also for the purpose of supplying people resorting there, bookmakers and others, with any refreshment they required in the course of carrying on this business.

AVORY J. It is not necessary to express any opinion with regard to the relative liability of the different persons who were summoned. The magistrate has not considered

(1) 1 Cr. App. R. 151. (2) [1895] 2 Q. B. 203, 204.

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that question at all, but has dismissed the whole of the charges against the defendants, including the two defendants who pleaded guilty and who do not appear to-day. I say nothing about the liability of the persons who permitted the use of these rooms as distinguished from those who actually used the rooms. It is clear that the magistrate has taken a broad view of the case, and considered that it is completely governed by the decision of this Court in *Downes* v. *Johnson* (1), and if he is wrong in that view it necessarily follows that the case must go back to him to adjudicate upon the merits.

I will point out at once the reason why I think the magistrate was wrong in saying that this case was governed by *Downes* v. *Johnson*. (1) In that case there was an express finding of fact that "the club room was used exclusively by members. Individual members had no prescribed places or 'pitches' in such club room, and there was no member who could be accurately described as holding 'a bag against all comers.'" That expression, I apprehend, meant that there was no evidence that any person was carrying on the ordinary business of a bookmaker, prepared to lay odds against any horse with any member of the club that chose to back it. The case goes on: "Certain of the members of the club usually laid odds against horses running in horse races, and certain others of the members usually backed horses so running, but frequently their respective positions were reversed, when the layers became backers and vice versa." Upon those facts it was impossible to argue that the business of a bookmaker—that is to say, a betting business as it is understood—was being carried on on those premises, and the findings of fact were quite consistent with it being merely a case of betting between members of a club, some of whom backed a horse and others laid against it, the position being occasionally reversed. There was no evidence that any particular member occupied any particular part of the room to which other members might resort for the purpose of finding him; and the result was the case was decided on the footing that there was a club, the members of which were

(1) [1895] 2 Q. B. 203, 204.

in the habit of betting with each other on the club premises. The decision, therefore, in that case must be taken, and can only be regarded as a decision to the effect that it is not an offence against the Betting Act for members of a club to bet with each other on the club premises; and that if they do bet neither they nor the proprietor of the club is liable under the Betting Act for any offence. But that is not the present case. In all its essential details the present case is different, because there is undisputed evidence here that certain members of this club are carrying on the business of bookmakers in a particular part of the club premises—namely, in the basement room. There is evidence that particular bookmakers are carrying on their business at certain definite places in that room, and that they are to be found at particular tables, and that those tables contain drawers in which the bookmaker keeps his money and the other paraphernalia necessary for the purpose of carrying on his business, and that this room in the basement is fitted up with all the paraphernalia necessary for the purpose of carrying on a betting business. Now that evidence seems to me not only to differentiate the present case from *Downes* v. *Johnson* (1) but to bring it distinctly within the authority of the other cases that have been cited, the most favourable of which to the defendants is *Powell* v. *Kempton Park Racecourse Co.* (2), from which passages have been read from the judgment of Lord Halsbury L.C., some of which perhaps might create a difficulty in applying the law to this particular case. In my opinion, however, the guiding principle of his judgment, as far as it affects the present case, is to be found in the passage (3) where he says: "I think it is clear that what the statute is dealing with here is the case of persons who are in control and occupation of the place which is assumed to be the betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business is that of a betting house or place to which people can resort for the

(1) [1895] 2 Q. B. 203. (2) [1899] A. C. 143.
(3) Ibid. 159.

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purpose of betting, not with each other, but with the betting establishment." In my opinion there was clear evidence that a betting establishment was established upon these premises, and that the other members of the club who resorted there did so for the purpose of betting with that betting establishment, which consisted of the bookmakers as distinguished from the members who were merely backing.

I suppose it can hardly be doubted that if a bookmaker chooses to open premises as a club, he being the proprietor of it, and having formed a club, carries on his business there as a bookmaker with the other members of the club whom he himself elected, he would be using the place for purposes prohibited by the statute. In my opinion it would not make any difference if there were two or more persons in partnership who opened such premises and called it a club, though they only carried on their business as bookmakers with the other members of the club.

In the *Kempton Park Case* (1) Lord James of Hereford, after dealing with what constitutes a place, which there is no need to discuss here, because there is ample evidence that this particular room was a place within the meaning of the Act, said this: "I do not find that the defendants"—the Racecourse Co.—" have opened, kept, or used this inclosure for the purposes of betting more than any other portion of the racecourse. Any member of the public can enter it for the purpose of seeing the race. No facilities for betting are provided by the defendants, and the fact that bets are made therein results from the personal action of the persons entering it." In the present case all the facilities for betting are provided at the club, and the fact that bets are made therein results from the attraction which those facilities for betting offer. I think, therefore, that *Powell* v. *Kempton Park Racecourse Co.* (2) is not an authority in favour of the defendants; but, on the contrary, that it supports the view that I have already expressed, as being the correct view of the law, and which certainly is quite consistent with the view that was expressed in *Downes* v. *Johnson.* (3)

(1) [1899] A. C. 195. (2) [1899] A. C. 143.

(3) [1895] 2 Q. B. 203.

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The magistrate seems to have thought—and I think this is the only other difficulty that was present to his mind apart from *Downes* v. *Johnson* (1)—that because the bets were made inter se—that is, between members of a bona fide club—the members could not be said to be persons resorting to the premises. I suppose he means this could not be said to be betting with persons resorting to the premises. That difficulty appears to me to be conclusively met by the decision of the Court of Crown Cases Reserved in *Rex* v. *Corrie and Watson*. (2) That was a case of betting carried on on club premises, the members of the club being divided into two classes, the defendants laying the odds, and the other members betting with them. Lord Alverstone said (3): "If this had been a case of members of a club resorting to the club for the purpose of betting together one with another, I am of opinion that there would have been no case to go to the jury. But here there is some substantial evidence that the members of the club were not betting with one another, but were divided into two classes, Corrie and Watson being the bookmakers and the others going there to bet with them. On many occasions Corrie and Watson occupied the same places, sat at the same table, and used the tape list. There also seems to be some evidence of a habit of Corrie's of laying the odds, as distinguished from the other members of the club." My brother Darling in his judgment said (3): "The answers to the question in this case dispose of the judgment of Wright J. in *Downes* v. *Johnson*. (1) The club was formed for two purposes: (1.) social; (2.) a place where one could bet." That is exactly the case here. This club is formed for two purposes: one, social; two, for certain of the members carrying on the business of betting, and carrying on, I think, a betting establishment.

For these reasons I am of opinion that there was ample prima facie evidence that the offences charged were being committed by one or more of these defendants, and therefore the case must be remitted to the magistrate.

(1) [1895] 2 Q. B. 203. (2) 68 J. P. 294.
(3) 68 J. P. 297.

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SALTER J. I am of the same opinion. Facts were given in evidence on which it was open to the magistrate to find that this room was a place where any member of this club who chose to resort there, at any rate at certain times, might be sure of finding certain members of the club who were regular bookmakers plying their ordinary trade as bookmakers, and ready to bet with him or any other member of the club who chose to go there. That being so, in my opinion there was prima facie evidence that this room was a place kept or used for the purpose of persons using the same betting with persons resorting thereto. Further, there was prima facie evidence that the six bookmakers and their clerks were persons who used this room for the purpose of betting with persons resorting thereto. There was therefore a prima facie case, and the magistrate must deal with it.

Appeal allowed. Case remitted.

Solicitors for appellant: *Woniner & Sons.*
Solicitors for respondents: *A. de Frece & Co.*

R. F. S.

[IN THE COURT OF APPEAL.]

BARKER v. STICKNEY.

C. A.
1918
Oct. 31;
Nov. 1.

[1916 B. 2594.]

Copyright—Assignment—Assignment over—Royalties—Liability of Second Assignee—Charge—Vendor's Lien.

The author of a book assigned by deed to a company the exclusive right of publishing it so that upon publication the company should be the sole owners of the copyright therein. The company undertook to publish the book forthwith at their own risk and expense. In addition to an allotment of shares to the author the company covenanted to pay him a royalty on the price of copies disposed of, to sell at prices agreed upon by the parties, to assign only to successors in business, and subject to the terms of the deed so far as applicable, to keep and furnish accounts of sales, and to allow the author to inspect the books of the company relating to the publication and sale of the work.

The company and a receiver appointed by debenture-holders subsequently with the assent of the ordinary creditors sold to a purchaser —who was a successor in business of the company—the copyright in the book so far only as the vendors had any right to sell and subject to all equitable or other claims thereon.

In an action by the author against the purchaser for an account and payment of royalties:—

Held, that the original deed of assignment showed no intention to impose a charge or reserve a vendor's lien upon the copyright for the royalties, and that the purchaser, not being a party to that deed, was not bound to account for or pay royalties to the author.

Werderman v. *Société Générale d'Electricité* (1881) 19 Ch. D. 246 discussed and distinguished.

Judgment of McCardie J. [1918] 2 K. B. 356 affirmed.

Rules proposed by the learned judge for ascertaining when a vendor's lien is reserved not approved.

APPEAL from the judgment of McCardie J., reported [1918] 2 K. B. 356.

The plaintiff was the author of a book entitled "The Theory and Practice of Heating and Ventilation." On January 11, 1912, he executed a deed of transfer to J. F. Phillips & Sons, Limited, which contained the following material clauses:—

1. "The author assigns unto the company the exclusive right of publishing the said book in the United Kingdom and the Channel Islands and the Isle of Man, and on publication the company shall be the sole owner of the copyright therein."

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2. "The company shall forthwith, at its own expense and risk, publish the said book."

5. "In addition to the allotment to the author of 1500 fully paid shares of 1*l.* each in the capital of the company, the receipt of which shares the author hereby acknowledges, the company shall pay to the author a royalty of 33⅓ per cent. on the cash price of all copies of the said book which shall be sold, and a royalty of 15 per cent. on the sale price of copies given away to architects, engineers, and others, such respective royalties to be payable half-yearly on January 1 and July 1 in each year."

6. "The company shall not dispose of the copyright in, or right of publication of, the said book in the United Kingdom except to such person or persons or company as may succeed to the business of the company, and subject to the terms of this agreement, so far as the same are applicable."

7. "The company shall publish and push the sale of the said book at such price only as shall be agreed upon between the parties, and shall keep and furnish to the author half-yearly on January 1 and July 1 in every year all proper accounts of the sale of such book, and will give the author all reasonable facilities for inspecting and taking copies of or extracts from the books of the company relative to the publication and sale of the said book."

In pursuance of this deed the book was published in the year 1912; the ordinary retail price was agreed, and 1500 shares were duly allotted to the plaintiff. Then the company, of which the plaintiff was one of the directors, fell into financial difficulties. On August 12, 1912, a receiver of all the assets of the company was appointed by the debenture-holders; and subsequently he acted, by consent, on behalf also of the ordinary creditors of the company. No order had been made for winding up the company. The defendant was the secretary of the company since June, 1912. On June 30, 1913, a deed was executed whereby the company and the receiver sold to the defendant the goodwill of the business, including the benefit of all orders and contracts, and all other the assets of the business, including copyrights, but excepting certain

specified book debts and patent rights. The sale of the copyrights was expressed to be "so far only as the vendors have any right to sell"; and "subject to all equitable or other claims thereon." It was admitted that the defendant succeeded to the business of the company, and that he had full notice of the terms of the deed of January 11, 1912. Since June, 1913, he had sold various copies of the book. The plaintiff brought this action claiming an account of all copies of the book disposed of by the defendant, and payment of the amount found due upon taking the account. The defendant denied that he was liable to account to the plaintiff or to pay any royalties to him.

McCardie J. gave judgment for the defendant.

The plaintiff appealed.

Colam K.C. and *Barrington-Ward* for the appellant. By clause 6 of the deed of January, 1912, any assignment of the copyright is to be subject to the terms of that deed, so far as the same are applicable. One of the applicable terms is that the author is to receive a royalty of $33\frac{1}{3}$ per cent. on the cash price of all copies of the book sold and 15 per cent. on the sale price of copies given away. Another is that the author is to be furnished with half-yearly accounts of sales, and to have all reasonable facilities for inspecting books relating to the publication and sale of the book. The effect of this clause is to impose a charge upon the copyright for the amount of the royalties. The respondent took with notice of this charge. By the express terms of the assignment of June, 1913, he took "so far only as the vendors have any right to sell." Taking with notice of the charge he took subject to it. But, whether a charge was imposed or not, it was part of the bargain between the parties to the deed of January, 1912, that the copyright should be dealt with in a particular way, and the profits disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability: *Werderman* v. *Société Générale d'Electricité* (1), per Jessel M.R. Where the intention of the parties is expressed

(1) 19 Ch. D. 246, 252.

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as it is in this deed, an assignee of the copyright with notice holds it subject to a lien for the payment of the consideration reserved: *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (1); *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell.* (2)

[SCRUTTON L.J. The question is whether the covenant of the purchaser or the property itself is to be the security for the purchase money: *Earl of Jersey* v. *Briton Ferry Floating Dock Co.* (3)]

Copyright being a right to prevent the multiplication of copies, and negative rather than positive in its nature, it is more likely that an author will, on parting with it, retain more than a mere right in personam as security for the consideration. He would naturally reserve, for his own protection, if not a vendor's lien, something "closely analogous to it," in the words of Neville J., in the *Dansk Rekylriffel Syndicat Case.* (2)

J. B. Matthews K.C., *G. A. Scott* and *Stuart Bevan* for the respondent were not called on.

BANKES L.J. This appeal fails. The appellant's only way to success is through the construction to be placed upon the original assignment of January 11, 1912. The question therefore turns entirely upon the construction of that document. There is nothing in its terms to help him on his way. No assistance, but rather confusion, comes from attempting to lay down general rules for arriving at the meaning of a document like this. The learned judge in a long judgment has tried to formulate some such rules, five in number, and has travelled over much ground, unnecessarily in my view, to reach his destination. He expressed the hope that points raised before him would receive the consideration of the Court of Appeal. I do not propose to deal with them. They seem to me unnecessary for the decision of this case. It is enough to say that I find myself unable to concur in the accuracy of some of the rules proposed

(1) [1902] 1 Ch. 146. (2) [1908] 2 Ch. 127.
(3) (1869) L. R. 7 Eq. 409.

by the learned judge, assuming it were desirable to lay down any such rules. Mr. Colam based his case upon one or the other of two well-known positions : first, the lien of an unpaid vendor ; and secondly, a charge upon property enforceable against a subsequent purchaser with notice of the charge. Mr. Barrington-Ward struck out a new line. He admitted that neither of those two principles was applicable, but he asked the Court to lay down a new rule for which there is no precedent, but which he said ought to be introduced because of the very special nature of copyright. I dismiss his suggestion in few words. There is no such distinction between copyright and any other kind of property as to induce the Court to find any new protection for the assignee of that right. Therefore this case resolves itself into the question whether either of the two well-known principles can be invoked by the appellant.

First, as to a vendor's lien. I refer to two cases—the first showing where a vendor has a lien, the second showing where he has not. In *Kettlewell* v. *Watson* (1) Lindley L.J., delivering the judgment of the Court of Appeal, said : " The prima facie right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase money is not duly paid." That is a clear statement of the rule. But there are cases where it does not apply ; and one is where the vendor takes as consideration for the sale or assignment a personal covenant to pay the purchase money at some future time. In *Earl of Jersey* v. *Briton Ferry Floating Dock Co.* (2), James V.-C. quotes a passage from the decision of Leach V.-C. in *Winter* v. *Lord Anson* (3) in these words : " In ordinary cases, where the conveyance expresses, contrary to the fact, that the purchase money is paid, there, though the estate passes at law by the conveyance, it does not pass in equity until the actual payment of the price—until the vendor has received that consideration for which it appears by the deed

(1) (1884) 26 Ch. D. 501, 507. (2) (1869) L. R. 7 Eq. 409, 413.
(3) (1823) 1 S. & S. 434.

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he contracted to part with his estate. Suppose it had been expressed in this conveyance that the price was not to be paid till the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the meantime; could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case that the vendor had contracted to part with his estate presently, not in consideration of the actual immediate payment of the price, but in consideration of the covenant for the future payment of that sum, with interim interest; and that having, therefore, the covenant, which was the consideration bargained for, the estate must pass by the conveyance in equity as well as at law." That being, as I take it, a correct statement of the rule, there is plainly no vendor's lien in the present case, for if anything is clear about the deed of January, 1912, it is that the appellant did part with his copyright in consideration of a covenant for payment of the purchase money in the shape of future royalties.

Then as to a charge upon the subject-matter of the assignment. On the face of this document does it appear that the assignor created a charge which would be binding and enforceable on a purchaser with notice of the charge? The document indicates no intention to create a charge. At the most, it suggests a doubt in the mind of the draftsman as to what the position would be if the assignee parted with the copyright. He placed some restriction on assignment; it was only to be to those who "may succeed to the business of the company." But still there is some misgiving as to the effect of such an assignment, because he adds that it must be "subject to the terms of this agreement, so far as the same are applicable." Those words are not enough to create a charge if it is not imposed by some other part of the document. In my opinion the appellant is not in a position to claim the assistance of either of the two principles in order to secure the benefit of the original agreement between himself and the company.

Three cases were much discussed in the argument. It is enough to say that in two of them—namely, *Werderman* v. *Société Générale d'Electricité* (1) and *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (2)—the Court construed the assignments as imposing a definite charge upon the property in question. It is not necessary to criticise the language of those documents, or say whether one would take the same view of their meaning. To be satisfied of the principle on which the Court acted, that alone is material. I only mention *Werderman's Case* (1) because of the comment upon it by Vaughan Williams L.J. in the third case discussed before us, *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3) He says (4): "If the judgments in *Werderman* v. *Société Générale d'Electricité* (1) are looked at carefully, I think it will be seen that all that is decided by that case is this, that if you had notice of a contract between the person under whom you claim property, real or personal, and a former owner of the property, whereby a charge or incumbrance was imposed upon the property of which you thus take possession and have the enjoyment, you take the property subject to that charge or incumbrance, and can only hold it subject thereto." In *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (2), Neville J. was applying the same rule, though he may have used language suggesting a desire to travel outside it. He says (5): "The principal question to be determined is whether the plaintiffs are entitled, as against the defendant company, to a lien or charge upon the patents in respect of the royalties reserved by the agreement." He then refers to *Werderman's Case* (1) and *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3) as showing "that, where the intention of the parties to such an agreement as this is so expressed, an assignee of the patents with notice of the agreement holds them subject to the payment of the consideration reserved. To use the words of Sir George Jessel (6): 'It is a part of the bargain that

(1) 19 Ch. D. 246.
(2) [1908] 2 Ch. 127.
(3) [1902] 1 Ch. 146.
(4) Ibid. 157.
(5) Ibid. 135.
(6) 19 Ch. D. 252.

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the patent shall be worked in a particular way, and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability.' The obligation to fulfil the terms of the agreement, being with regard to the assignees not personal, but attached to "—or, in other words, a charge upon—" the property which they acquired with notice of the terms upon which it was held by their assignor, disables them from holding the property without fulfilling the terms. It appears to me that such an interest of the vendor, if not properly described as a vendor's lien, is closely analogous to it. The question involved is whether, upon the true construction of the original assignment, it was intended that the vendor should retain a charge upon the property or that he should part with the property completely, looking solely to the personal liability of the purchaser to pay the consideration." These latter words show that Neville J. was quite in accord with the principle of the earlier cases. He came to the conclusion that the assignment in that case created a charge enforceable against subsequent purchasers with notice of the charge. If he meant that some new rule ought to be applied, as Mr. Barrington-Ward proposes, I cannot agree with that suggestion, and can find no authority for it. In the result, the appeal fails, and the judgment of McCardie J. stands, though I am not prepared to accept all the views expressed by the learned judge in the court below.

WARRINGTON L.J. In my opinion the right of the appellant under the original assignment of January 11, 1912, rests in contract only. According to well-known principles of law he cannot enforce against an assignee of his grantee the obligations entered into by his grantee in the original assignment. This is true in equity as well as at law. The equitable principle in accordance with which restrictive covenants are enforced against a purchaser with notice is confined strictly to such covenants, and does not extend to affirmative covenants: *Haywood* v. *Brunswick Building Society*. (1) The appellant, however, insists that he is entitled

(1) (1881) 8 Q. B. D. 403.

to a charge on the subject-matter of the agreement—namely, the copyright of his book—for the amount of royalties which the original purchasers agreed to pay. The question thus raised is one of the construction of the agreement. Does the agreement on its true construction impose a charge upon the copyright for the amount of the royalties? It assigns to the company, the original purchasers, the exclusive right of publishing the book, and upon publication the company are to be the sole owners of the copyright. Then follow obligations on the part of the purchasing company. They are to publish the book, submit proofs, and pay for drawings.

[The Lord Justice then read clauses 5, 6, and 7 of the deed of January 11, 1912, and proceeded.] There is nothing in those clauses to indicate that the vendor is to be entitled to a charge on the copyright. Clause 6, which was relied on, does not at all lead to that conclusion. The first part of that clause imposes a negative obligation in reference to the sale of the copyright; the second part is an attempt, which must fail, to impose upon a purchaser, by providing that he is to take, "subject to the terms of this agreement, so far as the same are applicable," an obligation to perform the positive stipulations agreed to by the original purchasers, but not originally imposed by way of charge. Moreover, a charge for royalties would seem to defeat its object; it could only be enforced by a sale of the copyright, which would put an end to royalties for ever.

Then it was argued that the appellant was entitled to a vendor's lien on the copyright for the amount of the royalties. That involves a misapprehension of the nature of a vendor's lien, which is nothing but this: If property purports to be conveyed, but the purchase money, though due, has not been paid, then the conveyance, though absolute in law, is not so in equity, but is subject to the right of the vendor to a lien upon the property for the amount of his unpaid purchase money, which he may realise by the sale of the property if necessary. But in the present case the royalties were not the purchase money; the consideration for the sale of the copyright

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was not the payment of royalties, which were not then due, and might never become due; it was the covenant of the purchasers when the royalties became due to pay them. For that there can be no vendor's lien. If there were, it would be open to the objection I have mentioned in the case of a charge imposed by the assignment itself, I mean the difficulty of realising it by sale of the copyright.

Werderman's Case (1), when understood, is perfectly plain. In that case the Court held the vendor entitled to a share of the profits of the patent. It was not a question of a charge upon the patent; it was an actual assignment of a share of the profits whether made by the original purchaser or by his assignee. This is clear from the judgments of Jessel M.R. and Lindley L.J. "Now," said Jessel M.R., "if the people owners for the time being of the patent are to work it, and are to pay 5 per cent. to the plaintiff out of the profits, then, whether we treat it as a partnership, or whether we treat it as a charge on the patent, or whether we treat it as a royalty, it is quite plain that nobody could take the patent with notice of that arrangement, and say we will keep all the profits and will not be liable to account. What *Spencer's Case* (2) and *Keppell* v. *Bailey* (3) have to do with such a case as this I cannot see. It is a part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability." The point is that profits were appropriated to payment, whether made by the original purchaser or by his assigns. Lindley L.J. says: "The word 'assigns' occurs in clause after clause, and particularly the accounting clause gives the plaintiff, which is somewhat unusual, a right to see the books of the assigns in order to see that he gets his proper share of the profits." *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (4) was simply a question of construction upon which Neville J. came to the conclusion that a charge had been created in favour of the plaintiff. These cases do not help the appellant. I would

(1) 19 Ch. D. 246, 252, 256.
(2) (1583) 5 Rep. 16a.
(3) (1834) 2 My. & K. 517
(4) [1908] 2 Ch. 146.

add that it seems to me undesirable, in questions of construction like this, to lay down rules or principles which are to determine what construction the Court shall put upon the document. The question always is: What does the particular document mean? And the less the Court is hampered by rules founded on other cases the better. From the fact that I do not examine the rules or principles which McCardie J. proposes it must not be supposed that I assent to them all.

I agree that the appeal must be dismissed.

SCRUTTON L.J. I agree. The case was considered in the court below on two lines. First, it was said the defendant has bought a copyright with notice of a contract affecting it, and, using the copyright, must perform the contract. Up to the year 1880 that argument might have prevailed. In *De Mattos* v. *Gibson* (1) Knight Bruce L.J. laid down the following rule: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." Down to 1881 the cases where a purchaser of property was restricted in his user of it were based upon the doctrine of notice, and upon that alone. Those cases will be found in the judgment of the Court of Appeal in *London County Council* v. *Allen*. (2) About that time a change took place. In *Haywood* v. *Brunswick Building Society* (3) the restriction was confined to cases where the covenant was negative. In 1882, the year after *Werderman's Case* (4) was decided, Jessel M.R. himself further limited the restriction in cases of land to negative covenants for the benefit of land, treating them as analogous to covenants running with land which a plaintiff could not enforce unless he had land for the benefit of which

(1) (1858) 4 De G. & J. 276, 282.
(2) [1914] 3 K. B. 642.
(3) 8 Q. B. D. 403.
(4) 19 Ch. D. 246.

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the covenant could enure. This point was afterwards expressly decided by the Court of Appeal in *London County Council* v. *Allen*. (1) Thus the doctrine was evolved as to real property. But as to personal property it was found that the general rule of Knight Bruce L.J. was quite impracticable, and *Taddy & Co.* v. *Sterious & Co.* (2), *McGruther* v. *Pitcher* (3), and *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (4) have settled the law that the purchaser of a chattel is not bound by mere notice of stipulations made by his vendor unless he was himself a party to the contract in which the stipulations were made. I see nothing to distinguish a chose in action such as copyright from chattels or land, and I think it is clear that a person acquiring a chose in action is not bound by mere notice of a personal covenant by his predecessor in title. That is the effect of *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (5) *Werderman's Case* (6) was decided in the year before *London & South Western Ry. Co.* v. *Gomm* (7), in which Jessel M.R. himself greatly restricted the effect of notice, and in my view *Werderman's Case* (6) cannot be supported on the ground that notice of a contract relating to personal property will bind a purchaser who is not a party to that contract. So much for the first ground on which this appeal was based.

Then it was presented as a case of a vendor's lien, or something analogous to it. As I understand the doctrine of a vendor's lien it is this: If the instrument of transfer shows an intention that the property shall not be transferred absolutely, but subject to a charge in favour of the transferor to secure some benefit to himself, he has a vendor's lien—that is, not a possessory lien, with which the common law is familiar, but a right in equity, the enforcement of which seems to be a matter of difficulty and doubt. If that is the principle to be applied I protest against building up a conventional code of construction by which the intention of the parties is to be determined by the use of particular words.

(1) [1914] 3 K. B. 642.
(2) [1904] 1 Ch. 354.
(3) [1904] 2 Ch. 306.
(4) [1915] A. C. 847.
(5) [1902] 1 Ch. 146.
(6) 19 Ch. D. 246.
(7) (1882) 20 Ch. D. 562.

I repel the suggestion that the Court is guided towards the intention of the parties to one deed by the light of what was found to be the intention of the parties to another deed after consideration of the intention of the parties to a third deed. The difficulties in the construction of wills have, in my view, been greatly increased by the way in which cases upon wills used to be argued, and by the elaborate text-books classifying recorded decisions. The problem being to discover what the parties to one instrument intended, the Court ought not to be bound by the construction put upon a particular phrase in another document. As I read the rules proposed by McCardie J. they are attempts to fetter the Court by conventional rules of construction. Any such attempt is extremely undesirable, and for that reason I think the proposed rules should not be followed.

When I look at this particular document I see that the transferees were to be the sole owners of the copyright in consideration of 1500 shares and future royalties, some of which have no reference to the price realised on sale, because they are in respect of copies given away. Reading the document carefully, I find in it no intention to reserve to the transferor any interest, legal or equitable, in the chose in action transferred. Consequently there is no equitable charge in the nature of a vendor's lien which the Court can enforce when the chose in action is in the hands of someone not a party to the instrument. It is said that this leaves authors in a difficult position, because a usual way of publishing books is to assign the copyright in consideration of royalties. An instance of this hardship came before the Courts in *In re Richards* (1), where the transferee of the copyright became bankrupt; and it was held, in accordance with legal principles, that the trustee in bankruptcy could not be made to pay the royalties. This was remedied by s. 60 of the Bankruptcy Act, 1914. Authors might perhaps seek similar protection against assignees who publish without paying the royalties. Otherwise let them keep the copyright themselves, and assign no more than a right to publish conditional upon

(1) [1907] 2 K. B. 33.

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royalties being paid, and only assignable if they are provided for. As the present case stands the appellant fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Field, Roscoe & Co.*
Solicitors for respondent: *Jenkinson, Meyler & Oliver.*

W. H. G.

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[IN THE COURT OF APPEAL.]

WILD *v.* JOHN BROWN & CO., LIMITED.

Employer and Workman—Compensation—Basis of Calculation—"Average Weekly Earnings"—Concurrent Contracts of Service—Miners' Trade Union Delegate—Contracts for Service—Inspector under s. 16 *of Coal Mines Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 50)*—Inspector of abnormal Working Places under Coal Mines (Minimum Wage) Act,* 1912 (2 *Geo.* 5, *c.* 2)*—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 2 (*b*).

A workman in addition to his employment by a colliery company as a miner at the coal face acted as a delegate of a miners' trade union, and was paid for each day he so acted a delegate's day's wage by the union. He also acted on occasions as an inspector under s. 16, sub-s. 1 of the Coal Mines Act, 1911, and also as an inspector of abnormal working places under the Coal Mines (Minimum Wage) Act, 1911. On these occasions he was paid for each day he was so engaged a day's wage out of the Checkweigh Fund, a fund contributed to by his fellow-workmen in the mine. On the days on which he was engaged in one or other of these capacities he was absent from the mine with the consent of the colliery company, but received no payment from them. The workman having met with an accident arising out of and in the course of his employment commenced proceedings for compensation, and claimed that the amount received by him in respect of the foregoing employments ought to be taken into account in estimating the amount of his average weekly earnings. The county court judge made an award in his favour:—

Held, that the payments were not made to him in respect of concurrent contracts of service within the meaning of Sched. I., par. 2 (b), of the Workmen's Compensation Act, 1906, nor in respect of services rendered to the colliery company so as to constitute them part of his average weekly earnings within the principle of *Great Western Ry. Co.* v. *Helps* [1918] A. C. 141, and therefore that the workman was not entitled to have them taken into account in computing the amount of his average weekly earnings as a miner.

Quære, whether compensation at a higher rate could not have been awarded under Sched. I., par. 2 (a), of the Act on the ground that it was impracticable at the date of the accident to compute the rate of remuneration.

APPEAL from an award of the judge of the Rotherham County Court, sitting as an arbitrator under the Workmen's Compensation Act, 1906.

On December 31, 1917, the applicant, Samuel Wild, was injured by an accident arising out of and in the course of his employment at the respondents' Rotherham Main Colliery. He recovered from the effects of the accident by January 19, 1918. His average weekly earnings at the coal face previously to the accident were agreed at 1*l.* 9*s.* 10*d.* He was paid compensation from the date of the accident up to the time of his recovery at 14*s.* 11*d.* per week (i.e., half his earnings) plus 3*s.* 9*d.* war addition under the Workmen's Compensation (War Addition) Act, 1917 (7 & 8 Geo. 5, c. 42).

The applicant claimed compensation at 1*l.* per week plus 5*s.* per week war addition between the date of the accident and January 19, 1918, on the ground that his average pre-accident earnings were over 2*l.* per week under the following circumstances: The applicant was a delegate of the Rotherham Main No. 2 Branch of the Yorkshire Miners' Association (a trade union registered under the Trade Union Acts). During the twelve months prior to his accident he attended 23 council meetings and 5 meetings of the Executive Committee of the Association. On these occasions he missed a day's work at the mine, and was paid by the Association a delegate's day's wage of 15*s.* 9d. and his travelling expenses, and received in respect of his services 22*l.* 15*s.* during 1917. He was also on one occasion during the twelve months prior to the accident appointed by the men to inspect the workings of the colliery pursuant to s. 16 of the Coal Mines Act, 1911. On that occasion he was paid a day's wage of 16*s.* 9*d.* out of the Checkweigh Fund (i.e., a fund subscribed to periodically by the men working at the pit). He was also on various occasions during the twelve months prior to his accident appointed by the men under the Coal Mines (Minimum Wage) Act, 1912, to inspect when disputes arose between the employers and men with regard to the condition of working places, and on each of these occasions was paid a day's wage out of the Checkweigh Fund, and received in all 10*l.* 18*s.*

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The applicant's contention was that in assessing his average weekly earnings during the twelve months prior to his accident the sums earned by him during that period in respect of the three foregoing employments should be included. If they were included his average weekly earnings would amount to over 2*l.* per week, and he would be entitled to compensation at 1*l.* a week plus 5*s.* war addition.

The Rules of the Yorkshire Miners' Association (so far as material) were the following :—

Rule 4. "The supreme government of the Association shall be vested in a Council, which shall consist of a President, Vice-President, General Secretary, Financial Secretary, Agent, Treasurer, and Junior General Secretary, and one experienced member, duly elected (as Delegate) by and from each of the Financial Branches composing the Association; and each delegate appointed to attend Council Meetings shall present to the President a credential from his Branch, empowering him to act as their representative, before being allowed to take part in the business of such Council Meeting. Every delegate must at the time of his appointment as such be employed in or about a mine."

Rule 6. "No branch shall be allowed to send more than one delegate to the Council Meetings, ... and every delegate shall exercise his vote or votes on all questions that may come before the Council, no delegate being allowed to remain neutral. . . . . Every Branch shall determine the length of time the delegate shall serve, but in no case less than three months. . . . ."

Rule 9. "Any member being dealt with by his Branch contrary to any rules of the Association shall have power to appeal to the Council, and the Council shall, after hearing both sides of the question, give their decision on the matter, and this shall be binding on all parties."

Rule 11. ". . . . No Branch may remain neutral unless the Council decide otherwise; and the majority of such registered votes to be decisive and binding upon the Association."

Rule 41. "In case any member shall do anything which is detrimental to the interests of his Branch or of the Association,

or shall omit to do anything that he ought to have done, and which would, if done, have been to the interest of his Branch or of the Association, the Branch Secretary or the General Secretary (as the case may be) shall report the matter to the Council, and the Council shall have power to expel such member from the Association, and thereupon he shall cease to be a member thereof, and shall lose all rights, privileges, and benefits of membership; and the Council shall be the sole judges as to whether any act or omission has been detrimental or disadvantageous to a Branch or the Association or not."

The county court judge held that the relations of master and servant were established in the case of the applicant's definite appointment as a delegate of the Association, and also, but more doubtfully, in the case of his statutory and other appointment as inspector. He found as a fact that each contract was a contract of service under the respondents, and that in pursuance thereof these payments were made, and on that ground he held that the applicant was entitled to succeed. He also expressed his opinion that the applicant was entitled to succeed on the ground that the payments were earnings received by him by reason of his employment, not necessarily from the employers themselves, but known and sanctioned by them as so likely to be received as to constitute an implied term of the contract of service with them on the principle of *Great Western Ry. Co.* v. *Helps.* (1) He accordingly made an award that the average weekly earnings of the applicant in the twelve months preceding the accident amounted to 2*l.* 2*s.* 10*d.*, and that there must be paid to him compensation at the rate of 20*s.* per week, with 5*s.* war addition, for the period of three weeks during which he was incapacitated after giving credit for the sum received.

The employers appealed.

Compston K.C. and *T. E. Ellison* for the appellants. Neither the election of the applicant as a delegate, nor his appointment as an inspector under the Coal Mines Act, 1911, constituted a contract of service with an employer within the meaning of

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Sched. I., par. 2 (b), of the Act. If anything they were contracts for service, but not of service. With regard to his position under the union the decision of this Court in *Flood* v. *Jackson* (1) shows that he was not a servant of the union. On that point there was no appeal to the House of Lords in *Allen* v. *Flood*. (2) The decision in *Flood* v. *Jackson* (1) covers this case, and is not affected by the reversal in the House of Lords in *Allen* v. *Flood*. (2) There was here no concurrent contract of service between the workman and any other employer, and therefore his earnings as a delegate cannot be brought in for the purpose of calculating his remuneration under the Act.

Similarly with regard to the inspectorship there was no contract of service. There was complete absence of control by the miners and no specific duty to be performed : *Simmons* v. *Heath Laundry Co.* (3)

Sched. I., par. 3, does not contemplate the inclusion of earnings quite outside the employment in respect of which the claim for compensation is made. It is not permissible in calculating the workman's earnings to take into account moneys received from some other source.

[SWINFEN EADY M.R. Are the man's duties as an inspector entirely outside his employment as a miner ?]

On the day of the inspection he is taken out of his employment as a miner. The moneys received by him as delegate or inspector are not connected with his duties to the appellant company as was the case in *Great Western Ry. Co.* v. *Helps*. (4)

The man's earnings must be confined to what he gets as the direct result of his employment. If under Sched. I., par. 3, his earnings from any source whatever could be included, then par. 2 (b) would not have been necessary.

[SWINFEN EADY M.R. May it not be that the remuneration is to be ascertained by reference to what is earned by a person in the same grade, under par. 2 (a) ?]

That proviso in the Schedule was intended to meet cases

(1) [1895] 2 Q. B. 21.
(2) [1898] A. C. 1.
(3) [1910] 1 K. B. 543.
(4) [1918] A. C. 141.

where the period of the employment is short or its nature casual.

[SWINFEN EADY M.R. It is not confined to that. By the terms of the employment the man is enabled to earn money as a delegate and as an inspector; if you only consider his wages as a collier you do not fairly estimate his average weekly earnings.]

The question is what is his remuneration for the service rendered by him to his employer from whom he is claiming compensation. What he receives for services outside that employment ought to be excluded.

Leslie Scott K.C. and *Shakespeare* for the respondent. This case is concluded by the principle enunciated in *Great Western Ry. Co.* v. *Helps.* (1) The natural meaning of compensation is that which makes up for the loss sustained. Unless there is something in the Schedule which cuts that meaning down then the earnings of this man as a delegate or an inspector ought to be included. It was a term of his arrangement with his employers, express or implied, that he should be free to act as delegate or inspector during part of the time during which he was bound to work for them, and that he should retain whatever was paid to him in respect of those duties. What he so received was therefore part of his earnings. The earnings of the workman as delegate and inspector were incidental to his employment as a miner in the sense that it was an inherent element in the whole industry that certain of the miners should be released for functions of the kind and receive earnings in respect of them. They were functions which could not be severed from the contract of service as a miner because it was necessary that a certain number of the miners should undertake this work. The earnings were in no sense casual but flowed from the contract of service as a miner. That did not, however, alter the character of the relationship.

As to his position as a delegate, his qualification required that he should be employed in a mine. The money he received as a delegate when he was temporarily released from his work as a miner clearly comes within the earnings made by the man

(1) [1918] A. C. 141, 144.

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under his contract of service with the colliery company. The case with reference to the money received as an inspector is even stronger. Both classes of receipts are due to his employment as a miner. The decision of the House of Lords under the Workmen's Compensation Act, 1897, in *Lysons* v. *Andrew Knowles & Sons Ltd.* (1) gives point to what was said by Lord Dunedin in *Great Western Ry. Co.* v. *Helps* (2), as to compensation being something which will cover the loss sustained.

If, however, the Court is of opinion that the earnings were not received by the workman in respect of his service as a miner, then it is submitted that they were received by him under concurrent contracts of service. Whether or not there were concurrent contracts of service is a question of fact, and there was here evidence upon which the county court judge could find, as he did, that such contracts existed. As regards his employment as a delegate, he is elected by the branch and paid by the Association. His duty was to represent the branch at the meetings of the Executive Council and to act upon their mandate. The rules of the Association show conclusively that only in certain cases can a delegate exercise his discretion upon matters which come before the Council, but that does not prevent his acts being done under a contract of service.

[SWINFEN EADY M.R. Is not the contract of service with the colliery company that the applicant should be entitled to absent himself on these occasions when he is away on services for the benefit of himself and his fellow-workmen ?]

It is submitted that while he is at the Executive Council he is in the employment of the colliery company. Business could not be carried on under modern conditions without such employment. Then as to his employment as inspector. That falls under two heads: (1.) his employment under s. 16, sub-s. 1, of the Coal Mines Act, 1911, and (2.) his employment under the Coal Mines (Minimum Wage) Act, 1912. Under the Act of 1911 his position is similar to that of a check weigher under ss. 12-15 of the Coal Mines Regulations Act, 1887 (50 & 51 Vict. c. 58). The miners who employ a fellow-miner as an

(1) [1901] A. C. 79. (2) [1918] A. C. 144.

inspector under the Act of 1911 treat him as a servant and on the same footing as a check weigher under the Act of 1887. No doubt an inspector has statutory duties to perform, but that does not prevent his position being that of a servant. The position of an inspector under the Act of 1912 stands on very much the same footing as that of an inspector under the Act of 1911. It is submitted, therefore, that there were concurrent contracts of service in each case, and that the earnings in respect of them ought to be taken into account in estimating the applicant's average weekly earnings.

It is desired to have a decision of this Court on the two specific questions raised. The applicant does not desire to support the award under Sched. I., par. 2 (a), on the ground that it was impracticable at the date of the accident to compute the rate of remuneration.

Compston K.C. replied, and referred to *Penn* v. *Spiers & Pond.* (1)

[SWINFEN EADY M.R. referred to *Charles R. Davidson & Co.* v. *M'Robb.* (2)]

SWINFEN EADY M.R. This is an appeal of the employers from an award of the judge of the Rotherham County Court, and it raises the question how the average weekly earnings of the applicant ought to be computed. The applicant was a miner employed by the employers in their mine, and his average weekly wages in respect of his duties of a miner whilst so employed amounted to 1*l.* 9s. 10*d.* a week. He suffered a slight injury on December 31, 1917, and it is not disputed that the injury arose out of and in the course of his employment. He injured his left arm and shoulder, and was incapacitated for upwards of fourteen days. The injury having happened on December 31, 1917, he had recovered about January 19, 1918, having been incapacitated about nineteen days, roughly three weeks. It is therefore a case in which the applicant is entitled to recover under the Act in respect of his being incapacitated for three weeks. The employers contend that he is not entitled to more than 18*s.* 8*d.* a week, and they arrive

(1) [1908] 1 K. B. 766. (2) [1918] A. C. 304.

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at that sum in this way. They say that the applicant's weekly earnings in the mine were 1*l.* 9*s.* 10*d.*, of which one-half would be 14*s.* 11*d.*, that that sum, with an addition of 25 per cent., 3*s.* 9*d.*, would come to 18*s.* 8*d.*, and that the 18*s.* 8*d.* per week is the amount of compensation to which he is entitled, and no more. On the other hand, the miner says, "Although I only earned from the colliery company in the 12 months of 1917 77*l.* 11*s.* 4*d.*, which would bring my average weekly wages to 1*l.* 9*s.*, in addition to that I earned three other sums: I earned or I received 22*l.* 1*s.* as a delegate from my branch of the Yorkshire Miners' Association. I earned on one occasion during the year 1917 16*s.* 9*d.* as a person appointed under the Coal Mines Act, 1911, s. 16, sub-s. 1, to inspect the mine. I also earned a sum of 11*l.* 14*s.* 9*d.* for acting on 16 occasions as an inspector where a question had arisen about an abnormal working place, so that," he said, "if you add to the wage that I received during the year of 77*l.* 11*s.* 4*d.*, the 22*l.* 1*s.* I received as a delegate, and the 11*l.* 14*s.* 9*d.* paid to me in respect of my inspections of abnormal working places, and the 16*s.* 9*d.* paid to me in respect of the day upon which I acted as an inspector under the Coal Mines Act, 1911, I received in the year 111*l.* 7*s.* 1*d.*, and that would work out throughout the year at the average weekly amount of 2*l.* 2*s.* 10*d.* The consequence is that I should be entitled to receive the maximum of 1*l.* a week, which, with the addition of the 25 per cent., would amount to 1*l.* 5*s.*," and it is that sum which has been awarded by the county court judge. The employers appeal, and contend that the only sum to which he was entitled was 18*s.* 8*d.* and not 1*l.* 5*s.* That is the dispute between the parties. It is quite true that the amount in question is small, only a few shillings, because it is the difference between those two sums for the period of about three weeks, but the parties concur in the view that the case raises questions of principle that are of importance, and it is on a matter of principle that the appeal is brought.

No question arises down to the point of the 18*s.* 8*d.* The applicant is obviously entitled to as much as that, but the question is, Is he entitled to anything more? That depends

upon whether the three several sums to which I have referred can properly be brought into account in arriving at the amount of his average weekly earnings. The county court judge decided in favour of the applicant, first, on the ground that these additional amounts were received under concurrent contracts of service in accordance with Sched. I., par. 2 (b); and secondly, on the ground that they were earnings received by the applicant by reason of his employment, not from the employers themselves, but known and sanctioned by them as likely to be received by the applicant so as to constitute an implied term of his service with them that he should receive them for his own benefit, upon the principle laid down in the *Great Western Ry. Co.* v. *Helps*. (1) It may be that there are some indications in the judgment that the learned judge was also prepared to allow the amount under a third head; he rather indicated it by his language in this way. He said: "It is in fact quite impossible to ascertain fairly the average weekly earnings of the applicant without taking these payments into account." Under the Sched. I., par. 2 (a), there is a proviso that where, by reason of, amongst other things, the terms of employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to other matters, and there was a suggestion that, from the language used by the learned county court judge, he was proceeding under that proviso. But counsel for the respondent to this appeal, after conferring with their professional clients, determined not to support the judgment below on any such ground; that is to say, they desired that the appeal should be decided on one or other of the first two grounds I have mentioned, and elected that if the applicant was not entitled to succeed on either of those two grounds, the award should be limited to the smaller amount. Therefore the first question is whether the learned judge was right in saying that the various payments received by the applicant were earnings under concurrent contracts of service.

As regards the applicant's receipts as a branch delegate of the Yorkshire Miners' Association, it appears from

(1) [1918] A. C. 141.

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the evidence that the applicant was elected as a delegate by his branch, and attended 23 Council meetings and 5 meetings of the executive committee at Barnsley. He stated that for attending these meetings he was paid by the Association, and received 22*l.* 1*s.* in the course of 1917. He said: "I attend as representative of my branch, and I put forward their views according to my mandate. I have to obey their instructions also as to executive committees." The contention on his behalf is that the relationship of employer and workman was constituted by his election to the office of delegate; and it was argued that he was a servant of the branch that elected him as he had to obey the mandate or instructions of the branch. It does not clearly appear whether he was paid by the branch or the Association. His evidence was that he was paid by the Association, and I do not gather that the learned judge took a different view from that. The learned judge says: "Each delegate is paid by his branch his travelling expenses, and if his attendance involves the loss of a day's wage he is paid a delegate's day's wage." But the learned judge does not find who paid him the delegate's day's wage, although he does say that the travelling expenses were paid by the branch. The question that arises is, what was his position as delegate of the branch? Did it constitute a contract of service within the meaning of the Act, and was the relationship of employer and workman constituted between the applicant and either his branch or the Association? The applicant said that there was nothing in writing specifying the duties of delegates except the rules of the Association which he produced, and that he was a delegate of the branch in pursuance of these rules. The rules provide for a Council consisting of certain persons who bear office, "and one experienced member duly elected (as delegate) by and from each of the financial branches composing the Association"; and it is provided that "every delegate must, at the time of his appointment as such, be employed in or about a mine," that the branch shall send delegates to the Council meetings, and (rule 6) that every delegate shall exercise his vote on all questions that may come before the Council, no delegate being

allowed to remain neutral. The duties of the Council are defined by the rules; and although it may be that some matters entered on a programme may be previously considered by the branch and the delegate be instructed to vote in accordance with the conclusion come to by the branch, that does not appear possible in respect of all the matters that come before the Council. One has only to read some of the rules to see that the delegate is a person who, whilst sitting as a member of the Council, is called upon to exercise a discretion and a judgment with regard to matters brought before the Council. It is quite obvious that under rule 9 a delegate is called upon as a member of the Council to exercise his judgment on the appeal of a member who complains that he has been dealt with by his branch contrary to the rules of the Association. So, too, it is in language determined that, in exercising the power of expulsion vested in the Council by rule 41, the Council shall be the sole judges. Of course that would be after hearing the person concerned. It cannot be that in a matter of this importance a delegate is to attend at the Council and vote, not according to his judgment but in the manner that has previously been directed by his branch, apparently before the matter has been discussed by the Council. The evidence really comes to this, that in certain matters the delegate may well have to obey the instructions of the branch that sent him, or their mandate, as the applicant says, but that, with regard to other matters provided for by the rules, he would have to exercise his own judgment and discretion. Can it be said that a person elected in such circumstances to be a delegate is under a contract of service as a workman either to the branch or to the Association? It seems to me to be obviously impossible. It cannot therefore be maintained that there was in this connection any concurrent contract of service within the meaning of the Workmen's Compensation Act, 1906, that has to be taken into account in arriving at the amount of the average weekly earnings of the applicant.

The next item in question is a single payment of 16*s.* 9*d.* in respect of one inspection by the applicant under s. 16, sub-s. 1 of the Coal Mines Act, 1911, which provides: "The

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workmen employed in a mine may, at their own cost, appoint two of their number or any two persons, not being mining engineers, who are or who have been practical working miners and have had not less than five years' experience of underground work, to inspect the mine"; and then the sub-section goes on to give the person so appointed a statutory right of access to every part of the mine. Sub-sect. 2 provides that the persons so appointed shall after making an inspection forthwith make and sign a full and accurate report of the result of the inspection in a book to be kept at the mine for the purpose. Any person, therefore, appointed by the workmen employed in the mine is under this statutory duty, and the choice has fallen upon the applicant once, and he has made an inspection accordingly. Can it be said that in respect of that matter he was acting as a servant of the workmen? The essential element which distinguishes a servant from a contractor or a person who enters into a contract for services, although not a contract of service, and constitutes the employer a master, is the retention by the employer of the power of controlling the work done. Here there was no power of control whatever. The person appointed to inspect is to have the right of employing skilled assistance and to go with that skilled assistance to every part of the mine; and he is bound to exercise his own judgment and skill in making the inspection, and then to make a full and accurate, that is, a truthful, report of such inspection. This he does, not under any directions from his employers; they cannot give directions as to the mode in which the inspection is to be made, the order in which he is to visit the various parts of the mine, the point to which he is specially to direct his attention, or the matters that he is to include in or exclude from his report. In these circumstances I am of opinion that a workman appointed by the employees of the mine for the purpose of s. 16, sub-s. 1 of the Coal Mines Act, 1911, is not a person who can be said to be under a contract of service with the other workmen by whom he is appointed.

The third head of receipt by the applicant was in respect of the inspections made by him of abnormal working places. On

this head, as on the head I have last mentioned, the learned judge expressed himself as somewhat doubtful. This employment as inspector was in respect of unusual and difficult working places. Under the Coal Mines (Minimum Wage) Act, 1912 (2 Geo. 5, c. 2), district rules had to be made in respect of the various mining districts specified in the Schedule to the Act. We have not seen these district rules, but no doubt they provide for carrying out the provisions of the Statute, and by s. 1, sub-s. 2: "The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen . . . . and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen . . . . and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control." It may well be that where the working place is abnormally difficult or presents some unusual and irregular features, a miner working there is unable to make the output of coal sufficient to justify the minimum wage. Then the difficult working place may excuse him because his failure to comply with the condition under which he receives the minimum wage is due to a cause over which he has no control. Although the district rules have not been put in evidence, I gather that the inspections now in question had reference to some abnormality with regard to the particular working place at which some particular gang or set of men were working. The evidence merely refers to these inspections as inspections for abnormality. The applicant said that he inspected on behalf of the men for abnormality, and that he made some 16 inspections in 1917 for which he received 10*l.* 18*s.* One could have wished that the evidence in this respect was a little clearer, but I assume—and as I gather that was the view of the county court judge—that the inspections were made on behalf of the men with a view to arriving at some conclusion as to whether the difficulties at

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particular working places were such as to relieve a collier working there from the obligation of making such an output of coal as to justify his receiving the minimum wage. Can it be said that this was work done under any contract of service so as to constitute the relationship of master and servant? In my opinion it cannot. In my opinion there is no evidence from which any inference can be drawn that there was any concurrent contract of service in rendering or discharging duties of that kind.

For all these reasons I am of opinion that the first ground on which the learned judge allowed the applicant's claim—that all these earnings were made under concurrent contracts of service—cannot be supported. In no one of these three matters which I have dealt with can it be said that the applicant had entered into a concurrent contract of service within Sched. I., par. 2 (b), of the Workmen's Compensation Act under which he was working for a different employer than the colliery company.

Then the learned judge based his decision on a second ground, depending upon the principle laid down in *Great Western Ry. Co.* v. *Helps*. (1) It has been decided that a man's earnings under a contract of service with an employer are not limited to the money that he receives from the employer, because it may well be that under his contract of service to perform the duties which the employer engages him to discharge, he may receive, besides what he receives from the employer, additional remuneration from persons connected with or having business with the employer for the services that he renders. The instance that the learned judge relied upon was the case of a railway porter who is employed by a railway company to discharge the ordinary duties of a porter including that of conveying passengers' luggage to and from the train. For his services as porter the railway company pay him, but in addition he receives gratuities from the persons whose luggage he carries. In that case it is in doing the very work which he was employed to discharge that he receives payment partly from the employer and partly from persons who derive benefit

(1) [1918] A. C. 141.

from his services. Another instance to which reference has been made is that of a waiter at an hotel or restaurant where in doing the very work of waiting upon the guests that he is engaged by the proprietor of the establishment to do he may, and usually does, receive not only payment from his employer but also extra remuneration in the form of gratuities from the visitors to the hotel or restaurant who profit by his services. In all such cases the money the servant receives is for doing services under his contract of service with his employers ; and in my opinion those cases bear no analogy to services rendered such as I have dealt with under the three heads. For the days on which those services were rendered the applicant did no work for the colliery company and received no wages from them ; he was not doing the work at the mine which the respondents had employed him to do. Doubtless when he was absent at Barnsley he had their permission to be absent from the colliery, and, when he was present at the colliery but engaged in other work, it was with their permission that this was done. The county court judge has so found. But the applicant was not doing on those days the work which he was employed to do for the colliery company, and as regards work so done, for which he received separate payment, there appears to me to be no analogy to the case where the work for which the workman receives additional payment from persons other than his employer is actually work done in the course of his employment and the very work which he was employed to perform. The learned judge held that it was an implied term of the contract between the applicant and the colliery company that he should be at liberty to accept the position of delegate to the Association and inspector under the Coal Mines Act, 1911, and in disputes as to working places in the mine ; and, no doubt, there was evidence on which the learned judge could arrive at that conclusion of fact—that is, that these duties were discharged by the applicant to the knowledge of and without any objection, complaint or opposition on the part of, the colliery company. But then the learned judge goes on to make a finding of fact for which I can discover no authority whatever in the evidence. He finds that the employers agreed " that

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payments for so acting"—that is, payments for acting as delegate and inspector—"would be reckoned in his average weekly earnings." I do not find a trace of any evidence to justify that finding. It was not alleged, and there is no reference to it in the evidence from beginning to end. In my opinion there is no justification for finding a special bargain that, even if these payments could not otherwise be reckoned in estimating the average weekly earnings of the miner, they should be so reckoned by virtue of a bargain or implied contract to this effect. In my view that finding is wholly unwarranted by the evidence, and must be disregarded.

Then towards the end of the county court judge's judgment there is a passage that seems to suggest that the learned judge was treating the employers, for the three several purposes that I have separately mentioned, as being the colliery company. He had previously determined that there were concurrent contracts of service without saying in each case who the employer was, and having so determined, towards the end of the judgment he says that even if the applicant's employment for the three several purposes was casual, it was "in connection with their trade or business." The learned judge is there referring to the definition of "workman" in s. 13 of the Act, where it provides that "workman" does not include any person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business; and I think that when the learned judge talks of "their trade or business" he obviously means the trade or business of the colliery company. It is difficult to reconcile this finding with the earlier part of the judgment. I am of opinion that there is no ground for saying that these earnings, which are altogether outside the contract of service with the colliery company, and are paid in respect of duties discharged and services rendered not under any contract of service with the colliery company, and indeed not under any contract of service at all, can be brought into account in estimating the applicant's average weekly earnings.

In my opinion the appeal ought to be allowed, and it ought to be determined that the amount which the applicant is

entitled to receive as compensation is 18*s.* 8*d.* a week and not the larger sum 1*l.* 5*s.* a week.

DUKE L.J. This case, although it deals only with a sum of less than 1*l.*—namely, the difference between 18*s.* 8*d.* and 1*l.* 5*s.* a week for compensation during 19 days of disablement—has been discussed at length as raising important questions of principle. The sum which the learned county court judge has added to the workmen's average wages of a miner was arrived at by consideration of three separate items; and, when you come to look into the case with closeness and care, it is quite obvious that, in connection with each of these items, questions arise in respect of which the parties are entitled to discuss the fundamental principles governing the relation of employer and workman, or, to use an old-fashioned expression, master and servant.

The applicant in this case was one of the delegates who formed the Executive Council of the Yorkshire Miners' Association, and in that capacity in the course of the year he attended 25 meetings of the Council and 5 meetings of the Executive Committee, in respect of which he received, apparently, out of the funds of the Association, a payment at the rate of 15*s.* 9*d.* a day. He was also an inspector appointed by the workmen at the mine in which his employment lay, to make inspections under s. 16 of the Coal Mines Act of 1911, and he was also a trusted representative of the workmen to take part in the proceedings between masters and men or between colliery proprietors and miners which dealt with the cases of abnormal working places for the purpose of adjusting the operation of the Coal Mines (Minimum Wage) Act, 1912.

With respect to each of these functions the applicant raises two contentions—first, that the moneys he received in respect of these functions were earnings in his employment with the colliery company; and, secondly, that they were earnings under concurrent contracts of service. The learned judge appears to have felt himself required to find in favour of the applicant on both grounds. They appear to me to be mutually destructive. If the earnings were earnings in the course of the

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employment with the colliery company, I cannot see by what process of reasoning it can be said that they were also earnings under other and concurrent contracts of service. It follows, I think, that this Court must ascertain what in truth the facts are, and what is the result of the application of the law, as it may be ascertained, to those facts.

I will deal first with the position of a delegate of the Yorkshire Miners' Association. This Association places its affairs, by rule 4 of its rules, under the supreme government of an Executive Council. The applicant as a delegate of one of the branches is a member of the Executive Council. The mode by which these representative institutions are operated is perfectly familiar, simple, systematic, and, in my opinion, businesslike. The Association has as its functions, among others, the administration of very considerable funds raised by contributions of 6*d*. per miner, as to which the treasurer is required by the rules to observe the directions of the Executive Council. The purposes for which the funds may be applied are disclosed in considerable detail by the rules, and include compensation of victims of strikes, contributions to a variety of purposes, and, possibly, the securing of the return of Members of Parliament. Among the purposes of the Association are to secure the prices and wages bargained for by the members with the employers; to prevent all illegal stoppages—that is, stoppages contrary to law by the employers; to protect members when unjustly dealt with by the masters or managers; to obtain and recover compensation for accidents to members; to secure the true weight of the material sent to bank by the miners; to provide a weekly allowance for the support of members and their families who may be locked out or on strike; to hear, under rule 9, disputes between miners and the branches of which they are members, and to deal with them by adjudication, and to be the tribunal, under rule 41, with absolute authority in cases of expulsion for misconduct of a member of the Association, either for not performing the assigned part of a member of the Association, or for failing to do what, in the judgment of the Council, a member of the Association ought to do to promote the interests of the Asso-

ciation. And yet the Court is seriously asked to find that the delegate, who is appointed by one of the branches of this Association to its executive for the purpose of carrying out those functions, discharges them under his contract of service with the colliery proprietor! It is a contradiction in terms. To my mind, it might just as well be suggested that the defendant's solicitor in an action was under some sort of contractual relationship with the plaintiff, because the common interest of both parties must be taken to be to arrive at a just result. It is to introduce into the terminology applicable to questions of this kind, where the governing principle is that of regard to two interests which are different and may be conflicting, terminology which might be appropriate to an idealised but totally different state of relations. When the functions which the delegate has to discharge at the Executive Council are considered, it is to my mind impossible to say with truth that he is at the Executive Council to represent the employer or that he is there as a servant of the employer with any obligation of fidelity or obedience to him. My answer, therefore, to the first question is that this workman is not, when he receives payment as a delegate, receiving it for services which he renders under his contract of employment with the colliery company. That is a contract of service not with the persons whose interests he as delegate seeks to promote but with those against whose interests he seeks to promote these other conflicting interests.

With regard to the second question whether there is, as regards the work of a delegate, a concurrent contract of service, it is raised only by the introduction into the discussion of the relation of employer and workman of phraseology proper to a discussion of a totally different kind. It is said that the delegate is there to promote the interests of the workmen and to render services to the workmen. The question is not, however, whether he is there to promote the interests of the workmen or to render them services, but whether he does his duties as a delegate under a contract of service. When you examine the kind of duties he performs, the duty of administering large funds and of directing the general affairs of the

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Association as one of a body entrusted with the supreme government of its affairs, and the duty of adjudication to which reference has been made, it is seen that this delegate is not a mere trusted messenger to communicate the decisions of others to a body of which he is one; he is an administrator and a person entrusted, with the body of which he is part, with the supreme government of the affairs of the Association, subject to observance of its rules. Therefore my answer to the question whether he discharged his duties as a delegate under a contract of service, is that they are not duties incident to a contract of service, and that there is no concurrent contract of service.

With regard to the inspection under the Coal Mines Act, 1911, the Master of the Rolls has pointed out, as was pointed out by counsel in the course of the argument, that the matter of paramount importance in connection with this work was the making of a true and accurate report of the state of the mine for the safety of life and for the safety of the undertaking. Can it be seriously said that he is the servant of any particular interest, either the colliery company or the workmen in the colliery, when he is discharging that very important function? In my opinion, that is not a function of service, but a function of statutory responsibility.

With regard to the third matter of inspection of abnormal places, I confess I find great difficulty in ascertaining with any certainty what the position of the applicant was in this connection, but I am satisfied that he did not do this work under any contract of service with the employers, and I do not find any evidence that he did it under a contract of service with anybody else. On the whole, I am of opinion on this point also that the judgment of the learned judge cannot be sustained.

Mr. Leslie Scott pressed us very strongly with the judgment of Lord Halsbury in *Lysons* v. *Andrew Knowles & Sons* (1) and the judgment of Lord Dunedin in *Great Western Ry. Co.* v. *Helps* (2), which emphasized the governing principle of this class of legislation—namely, that it is intended to secure compensation for injury, and that you are to administer the provisions of

(1) [1901] A. C. 79. (2) [1918] A. C. 141.

the Schedule to the Act as far as may be to secure compensation for injury. But you are to secure that compensation according to law, and not otherwise. It seemed to me in the course of the argument it was conceivable that this was an exceptional case dealt with by the provisions of par. 2 (a) of Sched. I., which provides that where it is impracticable to ascertain the rate of remuneration of the workman, a specific method may be resorted to of assessing the average weekly earnings. The Court was, however, requested not to deal with the matter on that footing, and not to support or attempt to support the award in favour of the applicant on that ground, and indeed any right to an award on that ground was disclaimed. I mention that because I do not want it to be supposed that the Court has refused to assess the compensation as in a case where it was impracticable to deal with it in the ordinary way. It may have been impracticable, but at the request of counsel for the applicant upon the express instructions of his client the Court does not deal with that aspect of the matter.

EVE J. I agree with what has already been said by the other members of the Court. In my opinion it is impossible to impose on the relations subsisting between the workman and the branch of his union, and between him and his fellow-workmen under the Coal Mines (Minimum Wage) Act, 1912, or the Coal Mines Act, 1911, the attributes of contracts of service, although such relations may involve the rendering of services by the workman and payment to him of a recompense by his union and his fellow-workmen or some of them for such services. Nor, in my opinion, can the payments made to the workman in respect of these matters legitimately be regarded as earnings obtained by him in his employment by the colliery company so as to bring the facts within the cases of *Penn* v. *Spiers & Pond* (1) and *Great Western Ry. Co.* v. *Helps.* (2) The learned judge's finding that it was an implied term of the employment by the colliery company that such payments should be reckoned in his average weekly earnings is, in my

(1) [1908] 1 K. B. 766. (2) [1918] A. C. 141.

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opinion, unsupported by any evidence at all. I think the appeal must be allowed.

Appeal allowed.

Solicitors: *Jackson & Jackson*, for *Gilchard, Gummer & Furness, Rotherham; Corbin, Greener & Cook*, for *Raley & Sons, Barnsley.*

W. I. C.

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[IN THE COURT OF APPEAL.]

JONES v. INTERNATIONAL ANTHRACITE COLLIERIES CO.

Employer and Workman—Compensation—Basis of Calculation—"Average Weekly Earnings"—Deductions from Wages—Miner—Cost of Explosives—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (2.), (*a*) (*d*).

A miner, in the course of his employment, contracted nystagmus, a disease mentioned in Sched. III. to the Workmen's Compensation Act, 1906, and was thereby partially incapacitated for work. In an arbitration under the Act it was found that his weekly wages before the accident were at the rate of 3*l.* 2*s.* 2*d.*, and that, in accordance with s. 61 (2.) of the Coal Mines Act, 1911, he had paid to his employers for explosives used by him in his work in the mine an average of 6*s.* 6*d.* per week:—

Held, that in computing his "average weekly earnings" under Sched. I. (2.) (*a*) the said sum of 6*s.* 6*d.* ought to be deducted from his gross weekly earnings, and that the rate per week at which he was being remunerated before the accident was 2*l.* 15*s.* 8*d.*

Held, also, that the case did not come within Sched. I. (2.) (*d*) of the Act.

M'Kee v. *John G. Stein & Co.* 1910 S. C. 38 explained and distinguished.

APPEAL by the applicant from an award of the Deputy Judge of the Neath County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The appellant was a collier employed by the respondents. As a result of the conditions of his work he was attacked by the industrial disease of miner's nystagmus on March 1, 1916, and was duly certified as suffering from that disease by the certifying surgeon on March 8, 1916. He received full compensation of 1*l.* per week until September, 1916,

when the respondents gave him light work on the surface at a wage of 2*l.* 6*s.* 9*d.* per week, with partial compensation at the rate of 8*s.* 5*d.* per week.

On March 28, 1918, he was dismissed from the respondents' service, but they continued to pay him compensation down to May 9, 1918, when he obtained work elsewhere as a caretaker at 30*s.* a week, with a bonus of 6*s.* a week. From that date the respondents refused to pay further compensation, on the ground that the appellant had recovered from the disease, and was no longer incapacitated for work. The appellant then requested an arbitration under the Act, and the question arose whether, in calculating the amount of the workman's "average weekly earnings" under Sched. I. (2.) (*a*) of the Act, there ought to be deducted from his gross weekly earnings a sum representing the cost of explosives bought by him from the respondents, and used by him in the course of his work in the mine. (1)

It appeared that it was in the discretion of the appellant whether, and to what extent, he should use explosives. His gross average earnings were 3*l.* 2*s.* 2*d.*, and the average cost of the explosives which he used in the mine was 6*s.* 6*d.* a week. The question, therefore, was whether, in calculating his "average weekly earnings" under the Act, the sum of 6*s.* 6*d.* ought to be deducted from the 3*l.* 2*s.* 2*d.* The county court judge came to the conclusion that the employers had been "accustomed to pay to the workman a sum to cover special expenses entailed on him by the nature of his employment" within Sched. I. (2.) (*d*), and that 6*s.* 6*d.* a week was accepted by the parties as representing the average weekly outlay for powder. Applying this principle to ascertain, under Sched. I. (2.) (*a*) (*d*), the rate per week at which the workman was being remunerated, he deducted the 6*s.* 6*d.* from the gross earnings, and decided that to be the manner best calculated to give the rate per week at which

(1) Sect. 61 (2.) of the Coal Mines Act, 1911, provides that "no explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner."

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the workman was being remunerated, and he accordingly assessed his remuneration at 2*l.* 15*s.* 8*d.*

The workman appealed.

Compston K.C., D. Villiers Meager and *F. van den Berg* for the appellant. There is no evidence to justify the finding of fact by the county court judge that the employers had been "accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment" under Sched. I. (2.) (*d*).

The amount which the miner has to pay for explosives used by him in the process of getting coal ought not to be deducted from his gross earnings in computing his average weekly earnings under Sched. I. (2.) (*a*).

The problem is the same as it was under the Act of 1897. In *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (1), by the rules of a colliery company 6*d.* a week was deducted from the wages of each miner for lamp oil supplied by the employers, and it was held that in assessing the miner's earnings under the Act of 1897 the deduction ought not to be made. That decision was approved by the House of Lords in *Abram Coal Co.* v. *Southern* (2) and in *Midland Ry. Co.* v. *Sharpe.* (3) In the latter case Lord Davey drew no distinction between "earnings" and "remuneration." The cases on this point under the Act of 1897 are of some assistance in considering the question now before the Court. It is submitted, however, that this case is covered by the decision in the Scottish Courts in *M'Kee* v. *John G. Stein & Co.* (4)

The workman has to get the powder somewhere, and he is out of pocket; but that does not affect the amount of his "earnings."

The decision to the contrary effect in *Shipp* v. *Frodingham Iron and Steel Co.* (5) is distinguishable.

Samuel for the respondents. *M'Kee* v. *John G. Stein*

(1) [1901] 1 K. B. 93.
(2) [1903] A. C. 306.
(3) [1904] A. C. 349.
(4) 1910 S. C. 38.
(5) [1913] 1 K. B. 577, 583.

& Co. (1) depended entirely upon Sched. I. (2.) (*d*), which does not apply here. This case depends on par. (2.) (*a*).

The circumstances of this case are very much the same as in *Shipp* v. *Frodingham Iron and Steel Co.* (2) In that case Hamilton L.J. said (3) that Sched. I. (2.) (*d*) did not apply. Here the workman gets the benefit of the explosives used in his work, and it is only fair that the cost of them should be deducted in assessing the amount of his "average weekly earnings."

Under par. (2.) (*a*), in order to arrive at the rate per week at which the workman was being remunerated, the amount paid for explosives ought to be deducted.

[He also referred to *Roper* v. *Hussey-Freke* (4), and particularly to the observations of Pickford L.J. in that case.]

Compston K.C. in reply.

SWINFEN EADY M.R. In considering the question before us it must be borne in mind that "compensation which is directed to be paid by the employers to a workman who is injured by accident arising out of, and in the course of, his employment, under s. 1 of the Workmen's Compensation Act, has its natural meaning; that is to say, something that is to be paid which makes up for the loss that the man has sustained." That was stated by Lord Dunedin in *Great Western Ry. Co.* v. *Helps.* (5) Questions have been raised from time to time under the Workmen's Compensation Act, 1897, with regard to whether certain deductions were to be made from wages in arriving at weekly earnings. In *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (6) it was held that the sum of 6*d.* per week for lamp oil deducted from a miner's wages could not be regarded, and that an award based on the full weekly wages of the injured miner, without regard to the weekly deduction, was correct. In *Abram Coal Co.* v. *Southern* (7) it was held that deductions by agreement for cleaning lamps, supplying oil, sharpening picks, and checking weights could not be brought into account, and that the

(1) 1910 S.C. 38.
(2) [1913] 1 K. B. 577.
(3) [1913] 1 K. B. 585.
(4) [1915] 3 K. B. 222, 227.
(5) [1918] A. C. 141, 144.
(6) [1901] K. B. 93.
(7) [1903] A. C. 306.

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earnings of the collier under the Act were his full wages without deductions.

In the *Midland Ry. Co.* v. *Sharpe* (1) it was held that allowances to a railway guard to cover his expenses when employed away from home from time to time must be treated as part of his earnings under the Act, even though the evidence showed that the allowances were so carefully adjusted and arrived at, that not much profit could be made out of them. It was pointed out that the sum so received for lodging money and expenses was an earning, even though fixed to meet a corresponding outlay. It was the question of earnings, and not profits. See the observations of Lord James in that case. (2)

The effect of this state of the law was that the heavier the expenses which any workman incurred, and the greater the sum allowed to him merely to cover those expenses, the larger his statutory earnings were deemed to be. The Workmen's Compensation Act of 1906 expressly altered the law in this respect. Sched. I. (2.) (*d*) provides that when the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment the sum so paid shall not be reckoned as part of the earnings. The effect of that was to reverse for the future the decision in *Midland Ry. Co.* v. *Sharpe*. (1) The Schedule lays down certain rules which are to be observed in arriving at the average weekly earnings. By cl. (2.) (*a*) it is provided that "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Then follows the proviso that "where, by reason of the shortness of the time during which the workman has been in the employment of his employer," or other circumstances therein mentioned, "it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had" to various matters. This shows that the object of the calculation to ascertain the average weekly earnings is to arrive at the amount of the workman's remuneration.

(1) [1904] A. C. 349. (2) [1904] A. C. 353.

Since the Act of 1906 *M'Kee* v. *John G. Stein & Co.* (1) has been decided in the Scottish Court of Session. The question there raised was whether the cost of explosives used by a miner ought to be deducted in arriving at his earnings. Lord Dunedin, then Lord President, said that the cases to which I have already referred absolutely covered that case if there had been no change in the law since they were decided, and there he held accordingly that the sole question left was whether there had been any change made by the then recent Act. He then quoted Sched. I. (2.) (*d*), and said (2): "I think the only question therefore is whether this expenditure or payment falls under that rule," and he held that it did not. It was not a payment to a workman, but a payment by a workman. The general question was not argued or raised as to the effect of the other portions of Sched. I. (2.), and especially of the direction to arrive at the rate per week at which the workman was being remunerated. The alterations introduced by the change of language in the rules for ascertaining the weekly earnings were not considered or discussed, but the whole question was treated as depending upon whether sub-cl. (*d*) of cl. (2.) affected that particular case. It was treated as if, for the purposes of that case, the only material alteration made by the new Act was the introduction of sub-cl. (*d*), and it was held that that clause did not affect the matter. A different rule was arrived at by the Court of Appeal in England in *Shipp* v. *Frodingham Iron and Steel Co.* (3), although the form in which the question was there raised prevents it from being a decision upon the point raised by the present appeal. In that case a gang of fifteen men was paid for ironstone and sandstone at piece-work rates, and the men used gunpowder for blasting. From the total amount earned by the gang the value of the powder used by the gang was deducted, and the net sum was paid to the ganger, who distributed it amongst the men in proportion to the number of hours they had worked. Shipp, the applicant, a member

(1) 1910 S. C. 38. (2) 1910 S. C. 40.
(3) [1913] 1 K. B. 577.

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of the gang, was injured. The sum paid to him was 1*l.* 6*s.* 2*d.* per week. That was his share of the net amounts paid to the ganger. His share of the powder used amounted to 3*s.* per week, and he claimed that his earnings ought to be treated as being 1*l.* 9*s.* 2*d.* per week, and not 1*l.* 6*s.* 2*d.* It was held that the latter amount was the proper sum on which to base his compensation, as the only contract was to pay him his aliquot share of the gross earnings of the gang, less the value of the powder. The point raised by the present case was expressly left open. Cozens-Hardy M.R. said (1): "In my opinion this case is plainly distinguishable from the case of an individual workman who is entitled to definite wages from which the employer is by contract allowed to make a deduction. It is sufficient for me to say that when such a case arises under the Act of 1906 it may be necessary to consider the effect of the change of language in that Act, where, for the first time, 'remuneration' is the word used. I do not wish to be considered as either assenting to, or dissenting from, the view on this point expressed in *M'Kee* v. *John G. Stein & Co.*" Then Buckley L.J. puts it in this way (2): "Lord Macnaghten in *Abram Coal Co.* v. *Southern* (3) (a case under the Act of 1897) said that 'earnings' mean 'the full sum for which the man is engaged to work' and not 'the net remuneration received by the workman or the balance left for him to spend on himself and his family.' When the matter arises for consideration under the Act of 1906 it may be that s. 2 (*a*), coupled with s. 2 (*d*), may render it necessary to consider whether those words, in their full meaning, are strictly applicable under the present Act. Under s. 2 (*d*), sums which would have been included in earnings under the previous Act (*Midland Ry. Co.* v. *Sharpe*) (4) are excluded under the present Act, and it may be that that consideration throws some light upon the true meaning of s. 2 (*a*). Thus, by way of illustration, if a man be employed at 27*s.* a week and 3*s.* for gunpowder, the 3*s.* is excluded by s. 2 (*d*). Suppose the

(1) [1913] 1 K. B. 581.
(2) [1913] 1 K. B. 583.
(3) [1903] A. C. 306-308.
(4) [1904] A. C. 349.

employment were at 30*s.* a week, the man finding his own powder—it may be difficult to say that the 3*s.* a week is in that case to be included in the earnings under the words 'the rate per week at which the workman was being remunerated.' But this consideration only becomes relevant where the employment is such as I first mentioned, namely, an employment at certain earnings and a deduction to be made from the earnings, and does not arise in the present case." Hamilton L.J. (1) pointed out that in that case the man's average weekly wages were 1*l.* 6*s.* 2*d.*

A somewhat similar question arose again with regard to deductions in *Roper* v. *Hussey-Freke.* (2) Pickford L.J. (3) says: "Prima facie the weekly sum paid to a servant is paid as his wages, but there may be circumstances which show that part of that sum although paid to him is not really part of his earnings, but paid to him for another purpose, and in that case such part must be deducted in calculating his earnings. I think that to justify such a deduction there must at least be a finding of the existence of one of two things: 1. An agreement by which the workman has to pay over part of what he receives for some purpose other than to remunerate himself. 2. A payment made out of the sum received by him for assistants or other purposes so necessary to the performance of his duties that it must be taken that part of the sum paid to him is to be applied for such purposes. I wish to guard myself against saying that either of those facts would necessarily justify such a deduction, but I do not think that in the absence of both of them it can be justified."

That being the state of the authorities, we have to consider the facts of the present case in connection with the words of the statute. The problem is to arrive at the man's average weekly earnings, and the object of solving the problem is to see what remuneration the man was earning by his labour, so that upon that there may be based the compensation that is to be awarded. What one has to arrive at is what is fair both to the workman and the employers. What was

(1) [1913] 1 K. B. 586. (2) [1915] 3 K. B. 222.
(3) [1915] 3 K. B. 227.

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the man really receiving for remuneration? In other words, what was the reward for his labour? It is that which by the accident he has lost. It is upon that footing that he is to be compensated, and you must arrive at it fairly. Sched. I. (2.), in my opinion, obviously points to that. The proviso to sub-cl. (*a*) is significant, because it introduces a new matter not to be found in the previous statute, that where, by reason of the shortness of the period of employment, or the casual nature or the terms of the employment, it is impracticable at the date of the accident to compute the rate of the remuneration, then regard may be had to other circumstances. It all points to this: that what you are to do is to arrive, by a fair calculation, at the reward which the workman was really receiving for his labour. In the present case all that the man was receiving was 2*l.* 15*s.* 8*d.* The 6*s.* 6*d.* was the sum for powder used by him, the average amount which he himself used during the week, and the only payment which was made to him was 2*l.* 15*s.* 8*d.* That was the reward for his labour. He got nothing out of the 6*s.* 6*d.*, nor did the employers. The employers were bound to supply the explosives at cost price, so they received nothing out of it, and the 6*s.* 6*d.* represents the actual cost of the powder used by the man during the week. Neither employer nor workman derives any profit out of this 6*s.* 6*d.* On what principle can it be said that, in estimating the matter fairly, that is part of the man's remuneration? The object of the present appeal is to obtain half of the 6*s.* 6*d.*—3*s.* 3*d.* a week—as increased compensation. Out of this powder money the man has lost nothing by his accident, he received no share of it, he was not benefited by it, and during the time that he was laid up by his accident he suffered no loss in respect of it, yet the claim is that he ought to have, to the extent of 3*s.* 3*d.* a week, increased compensation by reason of this 6*s.* 6*d.* But upon what principle? It would not be, as Lord Dunedin said in *Great Western Ry. Co.* v. *Helps* (1), anything on that footing that would have to be paid to make up for the loss that the man has sustained. He has sustained no loss in respect

(1) [1918] A. C. 141.

of this powder money. The claim really is that as compensation for his loss by the accident he might have a clear profit of 3*s.* 3*d.* a week in respect of this powder. In my opinion the new Act gives greater facilities for arriving at the true reward of labour that the man received. The Schedule is expressed in wider language, and it has removed what certainly was an obvious unfairness in the old Act, having regard to the way in which sums paid for expenses had been dealt with in *Midland Ry. Co.* v. *Sharpe.* (1) Under the new Schedule, by reason of the wide language used, the Court has to ascertain as fairly as may be, sometimes, as Lord Cozens-Hardy said, by estimate, but to ascertain as fairly as may be the remuneration the man has received—in other words, the reward of his labour. That he has lost, and it is with reference to that that he has to be compensated. On these grounds I am of opinion that the learned deputy county court judge was right in taking the average weekly earnings as 2*l.* 15*s.* 8*d.*, and that being so, the present appeal fails.

DUKE L.J. The question in dispute in this case is what, within the meaning of the Workmen's Compensation Act of 1906, was the rate per week at which the applicant was being remunerated in his employment by the respondents. The circumstances of the employment were of this kind. The applicant was a miner employed in cutting coal at the face of the seam. If he returned coal without the aid of explosives he was paid for the coal he returned at rates which appeared in a price list. It was at his discretion whether he should use explosives or not, but if he returned his coal with the aid of explosives he was paid not the rates in the price list but those rates less the cost of the explosives he used, taking the average of the amounts paid to him during the year before his disability arose. Having regard to the fact that the coal he returned was got with the aid of the explosives, he had, in fact, been paid at the rate of 2*l.* 15*s.* 8*d.* per week. If his discretion had been exercised otherwise

(1) [1904] A. C. 349.

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with regard to the use of explosives, and without using explosives he had contrived to return the same tonnage of coal, his earnings would have been 3*l.* 2*s.* 2*d.* per week. It seems not to be in dispute between the parties that the effect of the use of explosives with regard to the quantity of coal returned was that the bulk would be greater, but that the quantity of large coal would be less and the quantity of small coal, owing to the destruction by explosives, would be greater; and it was said on the part of the applicant that, on the whole, the use of explosives was to the disadvantage of the employer. As between the actual payment at the rate of 2*l.* 15*s.* 8*d.* and the hypothetical payment at the rate of 3*l.* 2*s.* 2*d.* the Court has to determine with regard to the operation of the Act of 1906 what was in truth, within the meaning of the terms employed in the First Schedule of the Act, the average weekly earnings of the applicant, the average weekly earnings being computed in such manner as is best calculated to give the rate per week at which he was being remunerated. If this was a case of compensation without reference to the express provisions of the statute I cannot conceive that any jury, rightly directed, would have any difficulty in arriving at the true conclusion upon the facts. The loss of earnings which was in fact suffered was the loss of earnings at the rate of 2*l.* 15*s.* 8*d.* a week. But it was pressed upon us that, under the Workmen's Compensation Act of 1897, this case ought to have been decided in favour of the applicant by reason of three decisions to which my Lord has referred. That may have been so. I am not bound to come to a conclusion on the subject, and I purposely say so. It is immaterial now what was the true decision under the Act of 1897. This case arises under the Act of 1906, and in the Act of 1906 the Legislature elaborated the directions which are to convey to those who have to determine compensation the principles on which compensation is to be determined. My Lord has pointed out what apparently from the course of litigation before the Act of 1906 was the reason for that elaboration of the mode of assessing compensation. I doubt not the amendment was made with

the desire to arrive at a juster standard of compensation between the parties. The very careful provisions of the second section of Sched. I. were framed with that object, not in the interests of one or of the other, but in the interests of justice. So I put aside the decisions under the Act of 1897, and I have regard to the amending Act dealing with this specific question. We were invited to treat it on the part of the applicant as though it were an Act which made no difference. It appears to me that it must be regarded on its own terms, and so as to give legitimate effect to its directions. It is said, further, that since the amending Act *M'Kee* v. *John G. Stein & Co.* (1) has been decided in the Scottish Courts. I do not find that the question which arises in this case was argued in *M'Kee* v. *John G. Stein & Co.*, and I do not therefore feel myself driven to the conclusion that it was determined. When I examine the leading judgment which was pronounced by Lord Dunedin what I find is that a question was raised as to whether certain payments made by the miner in that case were payments within the operation of sub-s. (*d*) of cl. (2.) in the first Schedule; that is, sums which the employer had been accustomed to pay to the workman to cover any special expenses entailed on him by the nature of his employment. In *M'Kee* v. *John G. Stein & Co.* (1) the Scottish Court decided that the sum there in question was not, as had been contended, a sum paid to the workman to cover special expenses entailed on him by the nature of his employment within the meaning of sub-cl. (*d*). What would have been the decision of the Court upon the arguments which we have here heard it is not for me to speculate. The net result is that this case is free from authority. But since the Act of 1906 the class of question which arises here has come into consideration in this Court in *Shipp* v. *Frodingham Iron and Steel Co.* (2) There was a very clear expression of the view in that case, not binding upon this Court, and deliberately reserved from binding effect; but, if regard is had to what was said by Lord Wrenbury, Buckley L.J. as he then was, in that case,

(1) 1910 S. C. 38. (2) [1913] 1 K. B. 577.

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Duke L.J.

help is found in the consideration of the question that arises here. Lord Wrenbury there said (1), by way of illustration: "If a man be employed at 27*s.* a week and 3*s.* for gunpowder, the 3*s.* is excluded by s. 2 (*d*). Suppose the employment were 30*s.* a week, the man finding his own powder, it may be difficult to say that the 3*s.* a week is in that case to be included in the earnings under the words 'the rate per week at which the workman was being remunerated.'" The question is left over. Then Pickford L.J. considered the principles which are to be applied with regard to the necessary payments of the workman in his judgment in *Roper* v. *Hussey-Freke*. (2) From what was there said (3) I think further help is derived for the determination of the question in this case. It comes to be a question of what is the true rate of remuneration. Is it the price list rate for coal without the aid of explosives, or is it the rate which was, in fact, paid for coal got with the aid of explosives? To my mind it must necessarily be the lower price, and, coming to that conclusion. I agree that this appeal ought to be dismissed.

EVE J. The point involved in this appeal is no doubt of considerable importance, but the facts and the law have been dealt with so exhaustively by the other members of the Court that I do not feel I can add anything beyond saying that I entirely concur in their judgment.

Appeal dismissed.

Solicitors for appellant: *John T. Lewis & Woods, for Randell, Saunders & Randell, Swansea.*

Solicitors for respondents: *John T. Lewis & Woods, for Andrew & Thompson, Swansea.*

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(1) [1913] 1 K. B. 583. (2) [1915] 3 K. B. 222.
(3) [1915] 3 K. B. 227.

[IN THE COURT OF APPEAL]

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1918
Nov. 9.

In re A DEBTOR

(No. 391 of 1918).

Bankruptcy—Act of Bankruptcy—Non-compliance with Bankruptcy Notice—Stay of Execution on Judgment—Debt contracted before Debtor had "joined His Majesty's Forces"—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1 (1.)—*Courts (Emergency Powers) Act,* 1917 (7 & 8 *Geo.* 5, *c.* 25), *s.* 8—*Military Service Act,* 1916 (*Sess.* 2) (6 & 7 *Geo.* 5, *c.* 15), *s.* 1 (1.)—*Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* (*g*).

Sect. 8 of the Courts (Emergency Powers) Act, 1917, provides that without the leave of the Court no person shall proceed to execution or otherwise to the enforcement of any judgment for the payment or recovery of any sum of money due and payable by a soldier under a contract made before he has "joined His Majesty's Forces."

A debtor liable to military service under the Military Service Act, 1916, on May 1, 1918, received a calling-up notice directing him to join the colours on a day therein specified. Before that date, but after the date of the notice, he had contracted a debt in respect of which the creditor obtained judgment against him, and without the leave of the Court served him with a bankruptcy notice with which he did not comply. The creditor then presented a petition in bankruptcy against him, the alleged act of bankruptcy being non-compliance with the bankruptcy notice. The Registrar dismissed the petition on the ground that execution on the judgment had, by the operation of s. 8 of the Courts (Emergency Powers) Act, 1917, been stayed, and consequently that no act of bankruptcy had been committed by the debtor:—

Held, by the Court of Appeal, that the petition was rightly dismissed, for that the debtor had not "joined His Majesty's Forces" within the meaning of s. 8 of the Courts (Emergency Powers) Act, 1917, until the date of the expiration of his calling-up notice.

APPEAL from an order of the Registrar in Bankruptcy dismissing a bankruptcy petition against the debtor. On April 2, 1918, the debtor borrowed from the petitioning creditors, upon a promissory note, the sum of 220*l.*, and on May 6, 1918, he borrowed from them, upon a further promissory note, the sum of 175*l.* On July 22, 1918, the petitioners obtained a final judgment in the King's Bench Division against the debtor for 406*l.* 9*s.* 9*d.* in respect of the above-mentioned debts. On August 15, 1918, they issued, and served upon the debtor, a bankruptcy notice, to enforce

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the judgment, which notice he did not comply with. On September 2, 1918, the creditors presented a petition for a receiving order, alleging, as an act of bankruptcy, the non-compliance with the bankruptcy notice. The debtor opposed the petition on the ground that the bankruptcy notice had been issued without the leave of the Court, as required by the provisions of the Courts (Emergency Powers) Acts, 1914–1917, and therefore non-compliance with it did not constitute an act of bankruptcy. His position with regard to the Courts (Emergency Powers) Acts was as follows. On May 1, 1918, he, being a person liable to military service under the provisions of the Military Service (Sess. 2) Act, 1916, received a calling-up notice which expired on May 29, and on that day he joined an Officers' Training Corps.

Before the Registrar the debtor contended that he had not "joined His Majesty's Forces" within s. 8 of the Courts (Emergency Powers) Act, 1917, until May 29, 1918, when, on the expiration of his calling-up notice, he actually joined up; and that, the contracts having been entered into before that date, he was protected by the section from execution upon the judgment without the leave of the Court, which had not been obtained.

The petitioners contended that he had joined the Forces on June 24, 1916, the date appointed by the Military Service Act, 1916 (Sess. 2), as from which, by the operation of s. 1 (1.) of that Act, he was "deemed to have been duly enlisted . . . . and to have been forthwith transferred to the reserve"; and that, the contracts having been made after that date, he was not entitled to the protection of s. 8 of the Courts (Emergency Powers) Act, 1917, and leave to proceed to execution upon the judgment was not therefore necessary.

The Registrar dismissed the petition, and from his decision the petitioners appealed.

Clayton K.C. and *E. W. Hansell* for the appellants. The debtor joined His Majesty's Forces when he was deemed to have been enlisted, and passed into the reserve—i.e., on June 24, 1916, the appointed date under the Military Service

Act, 1916 (Sess. 2). On that day he became subject to military law, and could only escape from service by obtaining his discharge. He then ceased to be a civilian, and became a soldier.

Before the passing of the Courts (Emergency Powers) Act creditors had a legal right to proceed to execution on a judgment. The Emergency Acts purport to take away or suspend that legal right under certain conditions. In order to take it away it must clearly appear that those conditions have arisen. A legal right cannot be taken away except by unambiguous language. If there be any ambiguity it must be resolved in favour of the person from whom it is purported to be taken away. The contracts in this case were entered into after the debtor had joined the Forces, and he is therefore not protected from execution under the judgment by the Courts (Emergency Powers) Act, 1917, s. 8, and his non-compliance with the bankruptcy notice founded upon the judgment constituted a good act of bankruptcy. The Registrar was wrong in dismissing the petition.

The following Acts of Parliament were referred to, and are dealt with by Swinfen Eady M.R. in his judgment: The Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78) s. 1 (1.); The Courts (Emergency Powers) (Amendment) Act, 1916 (6 & 7 Geo. 5, c. 13), s. 3 (2.); The Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 8; The Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), s. 1 (1.); The Military Service Act, 1916 (Sess. 2) (6 & 7 Geo. 5, c. 15), s. 1 (1.); The Army Act, 1881 (44 & 45 Vict. c. 58); The Army (Annual) Act, 1909 (9 Edw. 7, c. 3), s. 10 (2.); and The Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). *Fudge* v. *D'Ardenne* (1) was also cited.

Harold Benjamin for the respondent was not called upon to argue.

Swinfen Eady M.R. (after stating the facts). Under the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1, sub-s. (g),

(1) [1916] W. N. 415.

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non-compliance with a bankrupty notice constitutes an act of bankruptcy if a creditor has obtained a final judgment or a final order for any amount, and "execution thereon not having been stayed," has served the bankruptcy notice, which has not been complied with. So the real point here is whether execution has been stayed under the judgment; because, if execution has been stayed, then non-compliance with the notice is not an act of bankruptcy.

Under the Courts (Emergency Powers) Act, 1917, execution is thereby stayed in certain cases. The first Act, the Courts (Emergency Powers) Act, 1914, provided that a creditor should not proceed to execution, or otherwise to the enforcement, of any judgment or order for the payment or recovery of a sum of money to which this sub-s. applies, except, put shortly, by leave of the Court. The Act of 1914 applied to pre-war contracts. That was extended by the Courts (Emergency Powers) (Amendment) Act, 1916, in the case of "officers and men of His Majesty's Forces," to moneys payable in pursuance of a contract made before the commencement of that Act. The commencement of that Act was April 11, 1916, so that the effect of that provision was to extend the stay of execution beyond pre-war contracts and to contracts made after the war up to April 11, 1916. If that were all the contracts in question here would not be within those provisions, because they were both made subsequently to that date. Then, by the Act of 1917, the Courts (Emergency Powers) Act, 1914, is to have effect in favour of officers and men of His Majesty's Forces, subject to the modification that s. 1, sub-s. 1 of the Act of 1914 is to apply to any sum of money due and payable in pursuance of a contract made before the officer or man "has joined His Majesty's Forces." So that, again, is a further extension, not to a fixed date, but to a date to be fixed with reference to the time when the officer or man "joined His Majesty's Forces"; and if the contracts in question were entered into before the officer or man "joined His Majesty's Forces" then execution on the judgment is stayed.

The question, therefore, is at what date did the debtor

join His Majesty's Forces? The debtor came within the Military Service Act, 1916 (Sess. 2), passed on May 25, 1916, and as from the appointed day, June 24, 1916, he was deemed to have been duly enlisted in His Majesty's Regular Forces for general service with the Colours, or in the Reserve for the period of the war, and to have been forthwith transferred to the Reserve. The early Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), passed on January 27, 1916, in s. 3 contains certain supplemental provisions with regard to certificates of exemption, and provides, by sub-s. 5, that "where an application has been made by or in respect of any man for a certificate of exemption or for a renewal of such a certificate, he shall not be called up for service with the Colours until the application has been finally disposed of." There the phrase "called up" is extended, and called "called up for service with the Colours." The question which arises on the present application, therefore, is whether a man is deemed to have joined His Majesty's Forces as from the appointed date, or as from the date when the calling-up notice was served upon him, or as from the date fixed by the calling-up notice for him to report himself. The calling-up notice itself has not been produced; but it is provided for by the Army Acts. The Army Act, 1881, as amended by the Army (Annual) Act (9 Edw. 7, c. 3), s. 10 (2.), by s. 190 (8.) defines the expressions "Regular Forces" and "His Majesty's Regular Forces" to mean "Officers and soldiers who by their commission, terms of enlistment, or otherwise, are liable to render continuously for a term military service to His Majesty in any part of the world, including soldiers of the reserve forces when called out on permanent service." Then, by the Reserve Forces Act, 1882, s. 14 (1.), it is provided that "A man belonging to either of the reserve forces when called out on permanent service shall be liable to serve," and so on; and by sub-s. 2: "A man called out on permanent service shall during his service form part of the regular forces, and be subject to the Army Act, 1881, accordingly." In both cases it is limited to the time during which he is called out on permanent service. Sect. 24 of the same Act contains

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provisions with regard to the notice to be served. It says: "With respect to notices required in pursuance of the orders or regulations in force under this Act to be given to men belonging to the Army or Militia reserve, the following provisions shall have effect." Then it contains various provisions with regard to the service of notices upon the man, providing for their being served by being sent by post to his last registered place of abode, or by being served in the prescribed manner. Our attention has not been drawn to any Orders or Regulations prescribing what notices shall be given to a man in the Reserve to require him to join the Colours. Sect. 20, sub-s. 1 of the Reserve Forces Act, 1882, enables regulations to be made. It provides that "It shall be lawful for Her Majesty by Order signified under the hand of a Secretary of State, from time to time to make, and when made revoke and vary, orders with respect to the government, discipline, and pay of the army reserve . . . . and with respect to other matters and things relating to the army reserve." That is followed by s. 24, to which I have referred with regard to the notices required in pursuance of the Orders or Regulations, from which it would appear that the Regulations do provide for notice being given to the man when he is sent from the Reserve to join the Colours.

Now s. 8 of the Act of 1917 provides that s. 1, sub-s. 1 of the Act of 1914 is to apply to a sum of money due and payable in respect of a contract made before the officer or man has joined His Majesty's Forces. In my opinion that means, with regard to a man automatically deemed to have been transferred to the Reserve, "before the expiration of his calling-up notice." That is a notice calling him to the Colours, and at the expiration of that notice he is to be deemed to have joined His Majesty's Forces. But until then I am of opinion that he is not a person who has joined His Majesty's Forces within the meaning of this section; and of course that would be the sensible effect of such a provision. It can hardly have been intended to apply, as has been argued, to every man liable to military service under the Military Service Acts who is to be deemed to have been enlisted and

transferred to the Reserve. In the case of a large number of men engaged in the ordinary occupations of civil life, contracting debts from day to day, whose daily business is not interfered with by their liability to be called up, there would be no sense or meaning in exempting every one of those persons from liability to execution in respect of debts incurred under contracts. The manifest object of such a provision was to protect soldiers—officers and men—engaged in the important business of warfare from being harassed by claims under contracts.

For these reasons I am of opinion that the conclusion of the learned Registrar was sound, and that the appeal fails, and should be dismissed.

DUKE L.J. I agree. I do not think this case can be satisfactorily dealt with without a careful examination both of the Army Acts and of the Reserve Forces Act. We have also to bear in mind that His Majesty's Forces at the present time constitute an embodied army engaged in a tremendous war. The learned Registrar took the view that the protective provision of the section was intended to have the effect of relieving a man who had been called to actual military service from the obligations which he would have had to meet if he had not been so called. It was thought that for that reason the effective time for protection was the time when the man had indeed gone to be a soldier. That seems to me to be very good sense. An examination of the Acts of Parliament satisfies me that that is not only the popular but the accurate construction.

When my Lord began his judgment we had not before us any copy of a calling-up notice such as was in use at the date when the Courts (Emergency Powers) Act, 1917, was passed. But in the meantime, by the courtesy of an officer of the court, I have had a copy before me. The effective part of it is this: "You are hereby warned that you will be required to join for military service with the Colours" on such a day. "You should therefore present yourself at the appointed time on the above date" at such an hour, "bringing this paper with you"; and then attention is called to s. 15 of the Reserve

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Forces Act, 1882, which distinguishes between the time when the man was liable to be called upon for service and the time when he had in fact been required to join under such a notice as I have before me.

EVE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Woolfe & Woolfe.*
Solicitors for respondent: *Kelseys.*

G. A. S.

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[IN THE COURT OF APPEAL.]

THE KING v. PORT OF LONDON AUTHORITY. *Ex parte* KYNOCH, LIMITED.

London—Port Authority—Construction of Wharf—Application for Licence—Refusal without Hearing—Mandamus—General Policy in granting Licences—Alternative Remedy—Limitation of Time—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxvii.*), *s.* 109—*Port of London Act,* 1908 (8 *Edw.* 7, *c.* 68), *ss.* 2, 7—*Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The Port of London authority are, by s. 2, sub-s. 1 of the Port of London Act, 1908, charged with the duty of considering the state of the river and the accommodation afforded in the Port of London, and of taking such steps as they may consider necessary for the improvement thereof; and for these purposes they are enabled to construct, equip, maintain, or manage any docks, quays, wharves, jetties, &c. By s. 109 of the Thames Conservancy Act, 1894, and s. 7 of the Port of London Act, 1908, the Port authority may grant to any owner of land adjoining the Thames a licence to make any dock, basin, pier, jetty, wharf, &c. By s. 7, sub-s. 2, of the later Act, if the Port authority refuse to grant a licence for such a purpose on reasonable terms the applicant may appeal to the Board of Trade.

Owners of land adjoining the Thames having applied for permission to construct a deep water wharf and other extensive works, the Port authority in November, 1917, decided to refuse the application on the ground that the accommodation applied for was of the character of that which Parliament had charged the authority with the duty of providing. In September, 1918, the applicants applied for, and later obtained, a rule nisi for a mandamus commanding the authority to consider and exercise their discretion according to law upon the application, insisting that they had not done so:—

Held (1.) on the facts that there had been no refusal by the Port authority to consider and exercise their discretion according to law.

(2.) That the Port authority, in view of their position, powers, and duties, were warranted in adopting a general policy in granting licences under s. 109 of the Thames Conservancy Act, 1894.

Reg. v. *Sylvester* (1862) 31 L. J. (M. C.) 93 and *Rex* v. *London County Council* [1918] 1 K. B. 68 considered and distinguished.

(3.) That if the decision of the Port authority amounted to a refusal to exercise their discretion according to law, an appeal to the Board of Trade under s. 7, sub-s. 2, of the Port of London Act, 1908 (assuming it to lie), was as convenient, beneficial, and effectual a remedy as that by way of mandamus.

Rex v. *Stepney Corporation* [1902] 1 K. B. 317 distinguished.

The COURT, without deciding, inclined to the view that the six months' limitation to actions, prosecutions, and proceedings prescribed by s. 1 of the Public Authorities Protection Act, 1893, does not apply to the prerogative writ of mandamus.

RULE nisi for a writ of mandamus directed to the Port of London Authority commanding them to consider and exercise their discretion according to law upon the application hereinafter mentioned of Kynoch, Limited, the prosecutors.

The prosecutors were the owners of contiguous freehold lands on the northern bank of the Thames in the parish of Canvey Island, in the county of Essex, and the owners of lands adjoining the Thames within the meaning of s. 109 of the Thames Conservancy Act, 1894. (1) On June 8, 1917,

(1) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 109: "The Conservators may from time to time for a fair and reasonable consideration . . . . grant to any owner or occupier of any land adjoining the Thames a licence under the hand of the chairman of the Conservators or the secretary for all or any of the following purposes, namely:—

"(1.) For the making of any dock, basin, pier, jetty, wharf, bank, quay or embankment wall or other work immediately in front of his land and into the body of the said river. . . . ."

Port of London Act, 1908 (8 Edw. 7, c. 68), s. 2: "(1.) It shall be the duty of the Port Authority . . . . to take into consideration the state of the river and the accommodation and facilities afforded in the Port of London, and, subject to the provisions of this Act to take such steps as they may consider necessary for the improvement thereof.

"(2.) For the purposes aforesaid the Port Authority may, subject to the provisions of this Act, do all or any of the following things:

"(*a*) carry on the undertaking of any dock company transferred to the Port Authority by this Act;

"(*b*) acquire and carry on any undertaking affording or intended to afford accommodation or facilities for the

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they made an application under that section and s. 7, sub-ss. 1 and 2 of the Port of London Act, 1908, to the Port Authority for permission to carry out the following works in the river—namely, a deep water wharf, barge canal, and barge quays, with the necessary approaches thereto, to be executed according to plans accompanying the application. The works were required for the loading and unloading of vessels and dealing with passengers and general merchandise.

On November 2, 1917, the Port of London Authority replied to the application in the following terms: "The Authority have considered the application of June 8 last. . . . . The decision of the Authority was that the application be declined on the ground that the accommodation applied for

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loading, unloading, or warehousing of goods in the Port of London;

"(c) construct, equip, maintain, or manage any docks, quays, wharves, jetties, locks, or piers, and buildings, railways, and other works in connexion therewith . . . ."

Sect. 7: "(1.) Subject to the provisions of this Act . . . . there shall be transferred to the Port Authority all rights, powers, and duties of the Conservators of the River Thames . . . . in respect of the River Thames below the landward limit of the Port of London. . . . ."

"(2.) All enactments relating to the Conservators (except those regulating the funds . . . .) shall, so far as not repealed by this Act and so far as they relate to the rights, powers, duties, property, and liabilities transferred, have effect as if references to the Port Authority were substituted for references to the Conservators: Provided that . . . . (i.) if the Port Authority revoke any licence for any of the purposes mentioned in ss. 109 and 110 of the Thames Conservancy Act, 1894 . . . . or refuse to grant a licence for any such purpose on reasonable terms, the licensee or applicant may appeal against the revocation or refusal to the Board of Trade and the decision of the Board of Trade shall be final and binding on both parties. . . . ."

Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1: "Where . . . . any action, prosecution, or other proceeding is commenced . . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . . ."

is of the character of that which Parliament has charged the Authority with the duty of providing in the port."

The prosecutors being dissatisfied with this reply gave notice of appeal to the Board of Trade on April 24, 1918. Meanwhile in November, 1917, a Bill was introduced into Parliament to incorporate a company with power to construct a deep water wharf and railway at Canvey Island. The prosecutors and others opposed this Bill and in June, 1918, it was dismissed. In September, 1918, the prosecutors acting on legal advice withdrew their appeal to the Board of Trade, and applied to the King's Bench Division for a rule nisi for a writ of mandamus directed to the Port Authority commanding them to consider and exercise their discretion according to law upon the application of the prosecutors, on the ground that the Port Authority declined the application without having considered or exercised their discretion upon it. On October 18 the Divisional Court (Darling and Avory JJ., Salter J. dissenting) refused the rule. From this refusal the prosecutors appealed to the Court of Appeal, and that Court on October 21 granted a rule.

Thereupon the secretary of the Port Authority, on their behalf, filed an affidavit which contained the following paragraphs :—

" 2. The application of June 8, 1917, ... was on receipt thereof duly referred to and considered by the River Committee of the Port of London Authority in the first instance, and later by the General Purposes Committee of the said authority, and finally by the Board of the said authority.

" 3. The decision . . . . was . . . . arrived at after full consideration of the facts of the particular application as put forward by the applicants in their said application and the accompanying documents and of the reports of the officials of the said authority and of the said committees thereof.

" 5. The Port of London Authority in this case in accordance with their general practice in connection with applications under s. 109 of the Thames Conservancy Act, 1894, considered the particular case on its own merits, but in so doing no doubt, acting as the Port Authority, considered those merits

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in relation to the public interests of the Port of London and to their duties as such authority under s. 2 of the Port of London Act, 1908, and after such full consideration of the whole matter in the exercise of their discretion came to their conclusion as reported in my letter of November 2, 1917. . . . ."

Sir John Simon K.C. and *Wootten* showed cause. A writ of mandamus is a " prosecution or other proceeding " against the Port Authority in respect of an alleged " neglect or default in the execution of " a public duty—namely, the duty to hear and determine the application of the prosecutors. By s. 1 of the Public Authorities Protection Act, 1893, that prosecution or proceeding shall not be instituted unless it is commenced within six months next after the neglect or default complained of. The alleged neglect or default in this case took place on November 2, 1917, when the Port Authority is supposed to have refused jurisdiction. The writ of mandamus was not applied for until September, 1918. It follows that this rule should be discharged. No doubt Avory J. in *Rex* v. *Hertford Union* (1) said obiter that he was inclined to think the Act had no application to the prerogative writ of mandamus ; but there seems to be no authority for that view ; and, as is pointed out in Short and Mellor's Crown Practice, 2nd Ed., p. 219, the words of the Act are wide enough to include the writ.

Secondly, the Port Authority has heard and determined the application according to law. This is clear from the affidavit of the secretary ; but, if necessary, the authority might rely on the letter of November 2 alone. It is said that in accordance with a policy adopted beforehand the authority refused the application. But when the constitution and duties of the authority are considered it is plain that it was incorporated for the purpose of giving effect to a policy. It is their duty to take such steps as they may consider necessary for the improvement of the Port of London, and for that purpose to construct wharves. They may permit others to construct wharves if they consider that a suitable

(1) (1914) 111 L. T. 716.

method of providing accommodation; but if they think it inadvisable to set up imperium in imperio, or if they think the Port is sufficiently provided with wharves already, they are not bound to go through the form of hearing an application for permission. They may adopt a policy as the result of exercising their discretion. If their policy is a mistaken one the applicant's remedy is not by way of mandamus, but by appeal to the Board of Trade, or finally to Parliament. *Rex* v. *London County Council* (1), on which this rule was granted, was a very different case. There the London County Council had passed a resolution precluding themselves from exercising their discretion. The Port authority have in no way tied their hands. Further, that case was based on *Reg.* v. *Sylvester* (2), which, being a proceeding to question the exercise of a discretion which had been exercised, has no application to a proceeding to enforce the exercise of a discretion which, it is said, has not been exercised.

Thirdly, an appeal to the Board of Trade is an equally "convenient, beneficial, and effectual" remedy: *Reg.* v. *Registrar of Joint Stock Companies* (3), per Field J.

Fourthly, the application for a mandamus is made too late.

Talbot K.C. and *Scholefield* in support of the rule. The Port authority have not brought an open mind to bear on this application. They have determined without hearing it: *Rex* v. *London County Council.* (1) The affidavit of the secretary to the Port authority carries the case no further than his letter does, and that shows that this application for a licence has not been considered on its merits. The Port authority have taken into account "something extraneous and extra-judicial which ought not to have affected their decision"—namely, the possibility of competition with their own undertakings. That is the same as declining jurisdiction: *Reg.* v. *Adamson* (4); *Reg.* v. *De Rutzen.* (5) An improper rejection of evidence may amount to a refusal to hear and determine: *Reg.* v. *Marsham.* (6)

(1) [1918] 1 K. B. 68.
(2) 31 L. J. (M. C.) 93.
(3) (1888) 21 Q. B. D. 131.
(4) (1875) 1 Q. B. D. 201.
(5) (1875) 1 Q. B. D. 55.
(6) [1892] 1 Q. B. 371.

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No doubt a mandamus will not be granted where there is another remedy equally convenient, beneficial, and effectual: *In re Barlow.* (1) If there had been a hearing an appeal might be such a remedy; but where there has been no hearing mandamus is the only remedy. The appeal tribunal is entitled to have the decision of the inferior tribunal before it enters upon the appeal: *Rex* v. *Stepney Corporation.* (2)

There was no undue delay in applying for the writ of mandamus.

BANKES L.J. This rule must be discharged. In showing cause four points were taken: first, that the application for the writ was out of time by reason of the Public Authorities Protection Act, 1893; secondly, that the Port authority had in fact heard and determined the application for a licence; thirdly, that there was besides the writ of mandamus an equally convenient and effective remedy by way of appeal; and fourthly, that there was undue delay in applying for the mandamus. I take the last ground first. There seems to me to have been undue delay; but I do not decide the case upon that point, because other important matters were discussed upon which the parties are entitled to the decision of the Court.

The main ground was that the Port authority had not heard and determined the application of June 8, 1917, for permission to carry out works of a very important character with a very extensive frontage to the river. The application was made under s. 109 of the Thames Conservancy Act, 1894. Sect. 111 of that Act forbids the making of any such works without a licence. The origin of this jurisdiction to grant licences was a dispute between the Crown, the City of London, and the Thames Conservancy concerning the ownership of the bed and soil of the tidal river. Application having been made under s. 109, after some interval a reply was sent indicating, as the prosecutors contend, that the Port authority refused to entertain the application or to hear and determine it. Because of that reply this application for a mandamus was made.

(1) (1861) 30 L. J. (Q. B.) 271. (2) [1902] 1 K. B. 317.

Every case must depend on its own particular circumstances; but decided cases furnish some rules which ought to govern the Court in the exercise of its discretion to grant or refuse the prerogative writ of mandamus. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways: there may be an absolute refusal in terms, or there may be conduct amounting to a refusal. In the latter case it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction; but this conclusion may be drawn from decided cases, that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it. On this point I would refer to the words of Farwell L.J. in *Rex* v. *Board of Education* (1): "If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction." Again, in *Reg.* v. *Bowman* (2), where licensing justices had allowed their decision to be influenced by extraneous considerations, Wills J. said: "There has been no real hearing, and the mandamus must therefore go." Those two cases furnish a rough test for deciding when a tribunal, in considering matters outside its jurisdiction, has refused to exercise its true and proper jurisdiction.

(1) [1910] 2 K. B. 165, 179. (2) [1898] 1 Q. B. 663, 667.

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In the present case there is another matter to be borne in mind. There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes. Of the cases cited on this branch of the argument I would refer to two. The first is *Reg.* v. *Sylvester.* (1) An undue significance has been given to certain words of Wightman J. in that case. Justices had come to an annual licensing meeting resolved to refuse any application for a beerhouse licence unless the applicant was prepared to take out an excise licence for the sale of spirits in addition to the licence for the sale of beer. Now a decision of a tribunal may be wrong in point of law, but it does not follow that it involves a refusal to hear and determine. *Reg.* v. *Sylvester* (1) was a special case stated by the justices upon the question whether they had acted illegally in refusing to renew certain beerhouse licences because the applicants declined to take out licences for the sale of spirits also. On such a case it was not only open to the Court, but necessary for the Court, to consider whether the decision of the justices was or was not correct in point of law. The question whether the justices had or had not refused jurisdiction was not before the Court. Wightman J. in his decision uses these words: "They came to the meeting with a general resolution already prepared; and I answer the question put to us by saying that they were wrong in the way in which they exercised the discretion which is given to them." Those words have been cited as applicable to a

(1) 31 L. J. (M. C.) 93, 95.

proceeding based upon a refusal by a tribunal to exercise its discretion. The second case to which I would refer is *Rex* v. *London County Council.* (1) It is very material to see the rule which the County Council had adopted, and which was the foundation of the application for the mandamus in that case. An applicant having asked for permission to sell pamphlets in one of the public parks received this reply: "In reply to your letter I have to state that the Council has decided that no permits for the sale of literature at the Council's parks and open spaces are to be issued. I regret that it is not possible to make exception to this rule even in a most deserving case." The Divisional Court regarded that not as the adoption of a policy in the exercise of a discretion but as a refusal to exercise any discretion.

Now to apply these principles to the facts of this case. There is the letter of November 2 written on behalf of the Port authority by their secretary, and much relied on by the prosecutors, and there is his affidavit. It negatives the suggestion that the only matter considered by the Port authority was that specified in the letter. We must decide this case upon the affidavit. Read carefully and fairly it amounts to a statement that the Port authority did nothing which could be properly described as a refusal to hear and determine. But I go a step further. Even assuming that the letter contains the only ground on which the application was refused, I think, considering the position of the Port authority, that the matters involved in that decision were rightly and properly considered by them, and warrant the adoption of a general policy in granting licences for works of this particular class. Therefore on the main point the rule must be discharged.

It is not necessary to go at any length into the other matters raised. The exact meaning of s. 7, sub-s. 2 (i.) of the Act of 1908, giving a right of appeal, may some day have to be considered. In this case it is not in dispute. Mr. Talbot did however contend that admitting the right of appeal, the remedy by appeal was not equally convenient and beneficial.

(1) [1918] 1 K. B. 68.

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He referred to *Rex* v. *Stepney Corporation* (1), a case so dissimilar from this that the decision is of no practical help. There an appeal lay to the Treasury from a public authority, who, instead of deciding the case on their own view, conceived themselves bound by some rule of the Treasury, with which they might or might not have agreed. In these circumstances the Court might well think an appeal to the Treasury from its own decision was not so convenient and beneficial as an appeal from the decision of another tribunal, especially where the question was of the amount due to a particular officer. In the present case the question is one of policy to be decided ultimately by the Board of Trade. It can hardly be said that an appeal to that department is not as convenient and beneficial a remedy as a mandamus to the Port authority with an appeal from them to the department. I think the rule should be discharged on this ground also.

As to the effect of the Public Authorities Protection Act, 1893, I express no confident opinion without further considering the dicta cited, but my present impression is that the language of that Act does not extend to proceedings of this class. The essence of the prerogative writ of mandamus is a command to a tribunal to do something which it has omitted or refused to do, and an application for the writ is not an action, prosecution, or other proceeding for any act done in pursuance or execution or intended execution, nor, as I think, for any neglect or default in the execution, of any Act of Parliament or public duty or authority. But apart from that, the Act seems to contemplate something which results, if successful, in the payment of damages or in the enforcing of some penalty, and the words "action, prosecution, or other proceeding" were not intended to include a prerogative writ calling upon a public authority to perform a public duty. The rule must be discharged.

WARRINGTON L.J. I thoroughly agree, and have nothing to add.

SCRUTTON L.J. As the grounds on which a mandamus will be granted are difficult to state accurately, I prefer to

(1) [1902] 1 K. B. 317.

adopt the words of Wills J. in *Reg.* v. *Cotham* (1): "I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of mandamus. That is so whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction, and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law." I may add that if, before they sit to hear a matter, they have absolutely come to a determination their sitting may not be a hearing and determining because they have determined before hearing. Mr. Talbot says that the Port authority determined, before hearing this application, that they would grant no licence for a wharf likely to compete with the accommodation which by the Act constituting them they themselves are bound to provide, and that it was not open to them to take into account the question of competition. Now I state it as my view, because it is the substantial question in this case and that which the parties want decided, that the Port authority representing various interests in the Port are by virtue of the Act entitled in this matter of granting licences to regard the effect of the proposed accommodation upon the accommodation which they themselves have provided, or may have to provide, in discharge of their statutory duty. An applicant who cannot obtain a licence from the Port authority has his remedy by appeal to the Board of Trade, or he may promote a Bill in Parliament authorizing his undertaking. On this point, which goes to the merits, Mr. Talbot fails to show that the Port authority has taken into consideration, in the words of Wills J. (1), "matters which are absolutely outside the ambit of their jurisdiction."

Another reason against granting a mandamus is the existence

(1) [1898] 1 Q. B. 802, 806.

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of another and an equally convenient remedy. On a matter of trade policy an appeal to a Government department charged with the trade of England is a very convenient remedy.

As to the Public Authorities Protection Act, 1893, the writ of mandamus, like that of certiorari and prohibition, is a high prerogative writ, and a very valuable right in the Crown for keeping subordinate tribunals within their jurisdiction. Clear words are necessary to impair such a right, and the words of this Act, "action, prosecution, or other proceeding against any person," are no such clear words as to have that effect. There is less inconvenience in coming to this decision because the Court has always a discretion to refuse the writ of mandamus after an undue lapse of time. In this case I should have been prepared to hold that the prosecutors had, by delay, precluded themselves from relief; but as I have said, I prefer to decide the case upon the merits. I agree that the rule must be discharged.

Rule discharged.

Solicitors for prosecutors: *Kerly, Sons & Karuth.*
Solicitor for defendants: *Ernest Glenshaw.*

W. H. G.

ROURA & FORGAS v. TOWNEND AND OTHERS.

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Oct. 29, 30;
Nov 14.

[1918 R. 253.]

Insurance (Marine)—Profit on Charterparty—War Risks—Capture of Ship—Constructive Total Loss—Subsequent Restoration to Owners—Notice of Abandonment—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.

The plaintiffs sold a quantity of jute to Spanish buyers under contracts, an essential term of which was that the jute should be shipped before the end of January, 1918. To implement these contracts the plaintiffs, on September 13, 1917, chartered the Spanish steamship *Igotz Mendi*, which was under another charter to carry a cargo of coal from Delagoa Bay to Colombo, to proceed to Calcutta to load the jute and to proceed thence to Valencia to deliver the cargo. The plaintiffs, anticipating making a profit of 30,000*l.* from the venture, took out a policy of insurance with the defendants for that amount on profit on charter so valued against total and/or constructive loss of steamer only from Delagoa Bay via Colombo to Calcutta and until sailed. The policy was against marine and war risks, including capture by enemies of Great Britain, but excluding all claims arising from delay. The *Igotz Mendi*, which sailed from Delagoa Bay on November 4, 1917, with a cargo of coal for Colombo, and should have arrived at Calcutta during the first week of December, was not heard of until February 27, 1918, when news arrived that she had stranded on the coast of Denmark while in charge of a German prize crew, she having been captured on November 10, 1917, by a German cruiser in the Indian Ocean. The prize crew left her on February 27, and she was eventually refloated on March 9 by a salvage company employed by the shipowners, and was under repair until September, 1918, having been considerably damaged. Her owners were uninsured, and therefore did not, when they heard that the ship had stranded, give any notice of abandonment. The plaintiffs, on March 14, 1918, commenced an action claiming for a loss under the policy:—

Held, (1.) that there was a constructive total loss of the vessel, within s. 60 of the Marine Insurance Act, 1906, on her capture, as the balance of probability was that the owners would never recover her; (2.) that the giving of a notice of abandonment was not an essential element of a constructive total loss; (3.) that the capture of the vessel resulted in a total loss to the plaintiffs of their venture; (4.) that the fact that the vessel was restored to her owners did not preclude the plaintiffs from recovering, as their loss was not thereby extinguished; and (5.) that the plaintiffs' loss was not one arising from delay within the meaning of the policy.

ACTION tried in the Commercial Court by Roche J.

The following statement of facts is taken from the judgment.

"The plaintiffs were the assured under a voyage policy

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of marine insurance dated November 7, 1917, underwritten by the defendants. The assurance so effected was in respect of the steamship *Igotz Mendi*, and was against marine and war risks, including in the latter risks capture by the enemies of Great Britain. The voyage was at, and from, Delagoa Bay via Colombo to Calcutta and until sailed. The interest of the plaintiffs was valued at 30,000*l.* on profit on charter so valued. The policy also provided that the insurance was against total and/or constructive loss of steamer only, and excluded all claims arising from delay and/or deterioration and/or loss of market in respect of war only.

"The facts as to the plaintiffs' interest and as to the charter referred to in the policy were as follows: The plaintiffs are merchants. They bought, or held in Calcutta, over 6,000 tons of jute. These goods they sold to Spanish buyers under contracts which involved the shipment of the goods at Calcutta for Valencia, and also involved, as an essential term, that the latest time for performance was the month of January, 1918. To implement these contracts the plaintiffs, on September 13, 1917, chartered the Spanish steamship *Igotz Mendi*, then trading and about to arrive at Delagoa Bay, to proceed to Calcutta to load the jute in question, and to proceed thence to Valencia to deliver her cargo. The cancelling date in the charter was December 31, 1917. The plaintiffs anticipated a profit from the venture exceeding 30,000*l.*, and effected the insurance accordingly. The *Igotz Mendi* herself was not insured by her owners against either marine or war risks.

"On November 4, 1917, the *Igotz Mendi* sailed from Delagoa Bay with a cargo of coal for Colombo, and after discharging at Colombo should have arrived in Calcutta during the first week of December. But December and January passed without any news of the vessel, and it was naturally supposed that she had met with some fatal mishap. On February 23, 1918, application was made to Lloyds by the plaintiffs to secure the vessel being posted as missing, but on February 27, 1918, before she was so posted, news arrived that she had stranded on the coast of Denmark in a fog whilst in charge

of a German prize crew. The shipowners, being uninsured, had naturally neither right nor duty to give any notice of abandonment or to take any such steps as would have been appropriate had they been insured.

"The facts as to the disappearance and the reappearance of the vessel were these. On November 10, 1917, the *Igotz Mendi* was captured in the Indian Ocean by the German raider, or auxiliary cruiser, *Wolf*. If excuse for the capture had been required by the captors the cargo was, in fact, by its nature and destination, contraband. A prize crew from the *Wolf* was placed on board of the *Igotz Mendi* as well as a large number of persons, passengers from other prizes which the *Wolf* had taken and sunk. The adventures of captor and prize in the Indian, Atlantic, and Arctic Oceans were told before me by one of these passengers, Mr. Trayes, and are also set out in a record of a maritime inquiry which was admitted in evidence. The narrative was of considerable interest, but for the present purpose only a few facts need be stated. The *Igotz Mendi* was of obvious use to the *Wolf* as a collier consort and as a relief carrier of the numerous passengers or prisoners, 700 in number, collected by the *Wolf* from her sunk prizes. She was therefore disguised by a new coat of paint of the Allies' grey colour, and the two vessels voyaged to various places, sometimes in company and sometimes separate. At one point in the voyage, which was now directed towards the coast of Norway and thence to Germany through the North Atlantic, vessels were sighted which gave rise to some expectation of recapture. The Spanish mate was thereupon emboldened to throw overboard the bombs which had been put on board of the *Igotz Mendi* by the Germans, to be used if required for the destruction of the prize. The mate was sentenced to a long term of imprisonment in Germany and to a fine. The prize crew was strengthened and a new supply of bombs was placed on board. The fog and ice of the Arctic Circle were braved to avoid the blockading squadrons and patrols, and internment in Germany, which was now announced as the destination, of captives on board of the *Igotz Mendi* seemed their

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imminent fate, when, on February 24, fog and a grounding in Danish territorial waters and the intervention of the Danish authorities secured the release of the passengers. The *Wolf* herself had by this time arrived at Kiel, and on February 27, as it would rather seem in the expectation that salvage could not be effected owing to the prevailing bad weather, the German prize crew left the *Igotz Mendi*, as indeed did the Spanish crew after re-hoisting the Spanish flag. A salvage company was employed by the shipowners, and succeeded in refloating the vessel on March 9. She was considerably damaged, and was under temporary and permanent repair in Denmark and Spain until the month of September, 1918.

"In these circumstances the plaintiffs claimed to be paid the amount insured, and on March 14, 1918, issued their writ in this action."

The Spanish buyers at Valencia cancelled the contract for the purchase of the jute on January 31, 1918.

Mackinnon K.C. and *Le Quesne* for the plaintiffs.

R. A. Wright K.C. and *Simey* for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 14. ROCHE J. read his judgment, which, after stating the facts set out above, continued as follows:

The case for the plaintiffs, shortly stated, was that the *Igotz Mendi* was, by reason of the capture, a constructive total loss, and that by reason of such capture and constructive total loss they had suffered a total loss of their profit on the charter party. They did not suggest that they had given any notice of abandonment, but said that, as regards their interest, there was nothing to abandon, and no notice was required. The defendants agreed that this was so, and did not rely upon the absence of a notice of abandonment by the plaintiffs.

The defence was, in substance, rested on three grounds: (1.) That there never was a constructive total loss of the ship.

(2.) That if there was, restoration before action precluded a claim. (3.) That the claim arose from delay, and was excluded by the express terms of the policy.

As to the first point, it was said that to constitute a constructive total loss of the ship two constituent elements were necessary : (*a*) A state of facts external to the shipowner such as to warrant an election by him to treat the loss as total. (*b*) An election by the shipowner to so treat the loss expressed by a timely notice of abandonment. The defendants' case was that neither element was present in this case. With regard to the external facts the matter is now regulated by s. 60 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), which provides, amongst other things, that "there is a constructive total loss where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods." In *Polurrian Steamship Co.* v. *Young* (1) the Court of Appeal decided that this provision imposed a more onerous proof upon the assured than the case law on the subject had imposed, and that the test of "unlikelihood of recovery" had now been substituted for "uncertainty of recovery." I, of course, act upon that decision. It was conceded that in this case the ship was out of the owners' possession for $3\frac{1}{2}$ months, but it was contended that it was never securely in the possession of the Germans. It was asserted, I hope and believe with truth, that the squadrons and patrols of the navies of Great Britain, her allies and associates, were numerous and vigilant, and that recapture was probable or not unlikely. On the other hand, it is to be remembered that the seas are wide and the nights were dark and long during the critical stages of this voyage, and apart from any knowledge which may be permitted to a Court with regard to German practice in the destruction of merchant shipping, the evidence as to the sinking of all other prizes by the *Wolf* and as to the placing of bombs on board of the *Igotz Mendi* convinces me that the *Igotz Mendi* would not, save by some unexpected accident, have survived to be recaptured. I regard her actual recovery

(1) [1915] 1 K. B. 922.

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as due to a somewhat surprising combination of circumstances, and I find that the test laid down by Kennedy L.J. in *Polurrian Steamship Co.* v. *Young* (1) is satisfied; and I hold that it was not merely uncertain whether her owners would recover her in a reasonable time, but that the balance of probability was that they would never recover her at all.

With regard to notice of abandonment by the shipowner there was no dispute that in general such a notice is necessary. The point of debate was whether the giving of such notice is an integral element of a constructive total loss or is rather a condition precedent to a claim by the owner of ship and goods based upon such a loss. There are expressions in the Marine Insurance Act, 1906, ss. 60 and 61, which support, some one view some the other. A large number of cases were cited to me containing sentences of a like variable import, but it was contended by the defendants that the balance of authority was in their favour. I agree that modes of expression have been used by judges which support the defendants' argument, but other and often the same judges elsewhere use expressions of the contrary import. In truth, it is not satisfactory or useful to treat as definitions mere modes of expression adopted by judges whose minds were not directed to definitions or to the distinction now in question. As to real authority, in my judgment it is against the defendants. In particular the ratio decidendi in *Rankin* v. *Potter* (2) is opposed to their contention: see especially the judgment of Lord Chelmsford and the cases cited by him at pp. 156 and 158 of the report in that case. A condition precedent to a right of action may well be dispensed with in a proper case, but such dispensation would seem to be a nugatory and indeed impossible process to apply to an essential element of a thing itself. As regards the present action, the scope of the defendants' argument is curious and far-reaching. Their counsel, when pressed on the point, did not shrink, and in this they were entirely logical, from the conclusion that here, since the shipowners were uninsured, and since

(1) [1915] 1 K. B. 937 (2) (1873) L. R. 6 H. L. 83.

in that state of facts no notice of abandonment by them was possible, there never could be a constructive total loss of this ship and the risk never attached. I do not find myself in agreement with the defendants' reasoning or their conclusions, and I accordingly decide against their contention on this part of the case.

The next point taken on behalf of the defendants—namely, that the restoration of the ship to the shipowners before this action was brought renders the claim non-maintainable—really depends upon much the same line of reasoning as that I have dealt with in connection with notice of abandonment. This action is not by the shipowners, but the defendants' contention really involved a view that, under this policy, the real agreement between the parties was that the plaintiffs' right to indemnity was measured by the shipowners' right and ability to recover as for a constructive total loss. If this were the agreement the plaintiffs would fail, since it is well established that, at all events where there has been no acceptance by underwriters of an antecedent notice of abandonment, restoration of a captured ship before action brought disentitles a shipowner from bringing or succeeding in an action to recover payment as for a constructive total loss: see *Ruys* v. *Royal Exchange Assurance Corporation* (1) and the cases there discussed. But although there are dicta in reported cases—e.g., those made by the judges during the argument in *Tunno* v. *Edwards* (2)—upon the strength of which it can be contended that the reason of this rule is that there is no constructive total loss until the eventual fate of a ship is determined, yet I think that this argument is contrary to a large body of decisions: see in particular *Andersen* v. *Marten* (3), and the exhaustive review of the earlier decisions by Kennedy L.J. in *Polurrian Steamship Co.* v. *Young.* (4) See also Phillips on Insurance, vol. 2, §§ 1530 and 1531. What is perhaps more important is that the argument is contrary to the Marine Insurance Act, 1906, s. 60, which makes probability, and not the event, the test. The true

(1) [1897] 2 Q. B. 135.
(2) (1810) 12 East, 488, 490.
(3) [1908] A. C. 334.
(4) [1915] 1 K. B. 922.

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view, in my judgment, is that restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot, under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss if before action it has already been made good to him. Here no such objection to recovery can be opposed to the plaintiffs' claim. I have already held that there was a constructive total loss of the *Igotz Mendi* by her capture, and before the ship was restored to the owners such capture resulted in a total loss to the plaintiffs of their rights and profit under the charter. In short, the event agreed upon as necessary to give a right to indemnity had happened, and had irrevocably caused the loss of the subject-matter of the insurance. In these circumstances, as the restoration of the vessel itself to its owners did nothing to extinguish or minimise the plaintiffs' loss, so also it cannot, in my judgment, operate to extinguish or to bar the plaintiffs' claim.

There remains the defence based upon the fact that claims arising from delay were excluded by the express terms of the policy. It was said that it was the lapse of the time during which the *Igotz Mendi* was in German hands that caused the loss, and that such lapse of time was delay within the meaning of the exception. The reasoning of Bailhache J. in *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* (1) was relied upon in support of this part of the defendants' case. The decision of Bailhache J. in that case has, I understand, been affirmed by the Court of Appeal (2) on a ground having no bearing on the present case. I understand that the Court of Appeal did not consider, or at any rate express any opinion, as to whether they adhered to the view of Bailhache J. upon this point of the delay clause. It is certainly, therefore, undesirable and, in my view, also unnecessary that I should express any opinion on that matter. It is sufficient to say that in my judgment this is a very different case. In that case the adventure or voyage upon which certain goods were to be despatched, and on which

(1) [1918] 2 K. B. 123. (2) Ante, p. 39.

they were insured, was frustrated. The cause of frustration was not a capture or loss of the ship, as it was here, but a requisition of the ship amounting, at most, to a restraint. Moreover, in that case the subject-matter of insurance and the thing for which a loss was claimed was a quantity of goods. In this case it is, in substance, the venture itself which is insured. In that case it was decided that in the circumstances indicated the exception of claims arising from delay barred the claim for the loss of the goods based on the loss of the particular venture which was in progress. Here I have decided that the *Igotz Mendi* was not merely delayed but was captured and lost, although she was afterwards found and recovered, and I have decided that, in consequence, this venture, being the profit on charter, was lost, and I also decide that the claim to recover for the loss is not a claim arising from delay. I give judgment for the plaintiffs for the amount claimed with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Parker, Garrett & Co.*
Solicitors for defendants : *William A. Crump & Son.*

R. F. S.

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Nov. 7, 8, 15.

MANBRE SACCHARINE COMPANY, LIMITED *v.* CORN PRODUCTS COMPANY, LIMITED.

[1917 M. 1890.]

Sale of Goods—C.I.F. Contract—Payment against Shipping Documents—Loss of Goods before Tender of Documents—Knowledge of Vendors—Policy of Insurance—Guarantee to hold Purchasers covered—Validity of Tender.

A vendor under a c.i.f. contract for the sale of goods, who has shipped the appropriate goods under a proper contract of carriage and obtained the proper documents, can effectively tender those documents to the purchaser notwithstanding that he knows at the time of such tender of the loss of the goods.

In re Olympia Oil & Cake Co. and Produce Brokers Co. [1915] 1 K. B. 233 commented upon.

Under a c.i.f. contract the vendor is bound to tender to the purchaser a proper policy of insurance together with the other shipping documents, and that obligation is not performed by the vendor guaranteeing to hold the purchaser covered by insurance in accordance with the terms of a policy of insurance in the vendor's possession.

The purchaser under a c.i.f. contract is entitled to demand a policy of insurance which covers, and covers only, the goods mentioned in the bills of lading and invoices.

Action tried in the Commercial Court by McCardie J.

The following statement of facts is substantially taken from the judgment.

This action was brought to recover damages for the breach of two c.i.f. contracts. By a contract dated October 16, 1916, the defendants sold to the plaintiffs "4,000 280 lb. bags American pearl starch. Price @ 14*s.* 6*d.* per cwt. c.i.f. London (including war risk insurance). Shipment, December-January, 1916-17 (seller's option). Terms, net cash against documents upon presentation."

By a second contract dated November 18, 1916, the defendants sold to the plaintiffs "900 barrels Globe 3A Crystal Corn Syrup. Price @ 20*s.* 6*d.* per cwt. c.i.f. London (including war risk insurance). Shipment, December-February, 1916-17 (seller's option). Terms, net cash against documents upon presentation."

On February 19, 1917, the plaintiffs wrote to the defendants asking for deliveries of starch and syrup under the contracts. On February 20 the defendants replied that they had no tidings of any goods on the way for the plaintiffs.

On March 14, 1917, however, the defendants wrote the following letter to the plaintiffs :—

"Dear Sirs,

540 barrels Globe 3A Corn Syrup.
560 220 lb. bags American pearl starch.
186 140 lb. bags do.

We hereby hold you covered by insurance for the amount of 4,322*l.* in accordance with the terms of policy of insurance in our possession re shipment ex s.s. *Algonquin*.

Yours very truly,

CORN PRODUCTS CO., LTD."

Enclosed in the letter were certain bills of lading for starch and syrup shipped on the *Algonquin*. The letter also contained two invoices. The first (so far as material) was as follows :—

"March 14, 1917.

Net cash against documents upon presentation.
560 220 lb. bags American pearl starch.
186 140 lb. bags do.
Cwt. 1,332.2 @ 14*s.* 6*d.*, 966*l.* 1*s.* 3*d.*
c.i.f. London.
s.s. *Algonquin*."

The second (so far as material) was as follows :—

"March 14, 1917.

Net cash against documents upon presentation.
540 barrels Crystal Corn Syrup.
Cwt. 3,273.0.20 @ 20*s.* 6*d.*, 3,353*l.* 0*s.* 2*d.*
c.i.f. London.
s.s. *Algonquin*."

The total of the two invoices was substantially the sum of 4,322*l.* mentioned in the above letter of March 14, 1917.

Upon receiving the above letter and documents the

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plaintiffs at once replied to the effect that they could not accept them as a delivery against the contract for the following reasons: (1.) That the *Algonquin* was sunk by either a submarine or mine on March 12, 1917. (2.) That the defendants must have known that fact before they wrote their letter on March 14.

In answer to that letter the defendants stated (in substance) that the reasons given by the plaintiffs for refusing the documents were inadequate in law. The defendants made no further tender.

In the early part of February, 1917, the defendants had shipped on the s.s. *Algonquin*, then at New York, a large quantity of goods including the goods mentioned in the two invoices sent to the plaintiffs on March 14.

The plaintiffs abandoned (for reasons not material to state) any point as to the starch having been shipped at the beginning of February, 1917, instead of the period December-January, 1916-17.

Upon the whole of the goods so shipped the plaintiff effected several policies of insurance with various insurance companies in London. Each policy was free of particular average. The value at which the pearl starch was insured was about 35*s.* per cwt. as compared with 14*s.* 6*d.* per cwt., the contract price to the plaintiffs. This figure of 35*s.* was approximately the market value of the starch at the date of the insurance. The value at which the syrup was insured was about 40s. per cwt. as compared with 20*s.* 6*d.* per cwt., the contract price to the plaintiffs. The figure of 40*s.* was approximately the market value of the syrup at the date of the insurance.

The market price of starch and syrup steadily rose from the end of 1916, and in the middle of March, 1917, the figures respectively were 40*s.* 9*d.* and 42*s.*

The *Algonquin* sailed from New York on February 15. She was sunk on March 12. The defendants were aware of the fact prior to March 14.

Hogg K.C. and *Jowitt* for the plaintiffs.

MacKinnon K.C., *G. A. Scott*, and *Stuart Bevan* for the defendants.

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The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 15, 1918. McCARDIE J. read a judgment which, after stating the facts set out above, continued as follows :—

The first question arising can be briefly stated as follows: Can a vendor under an ordinary c.i.f. contract effectively tender appropriate documents to the buyer in respect of goods shipped on a vessel which at the time of tender the vendor knows to have been totally lost? In opening the case for the plaintiffs Mr. Hogg K.C. submitted that the answer to this question was "No," and he relied upon *In re Olympia Oil & Cake Co. and Produce Brokers' Co.* (1) If that case so decides, and if it be still an authority, I should feel bound to follow it, inasmuch as the judgments were given by three learned judges sitting as a Divisional Court after full argument and consideration. It has undoubtedly been the view of many lawyers and of many commercial men that the *Olympia Case* (1) was a decision to the effect submitted by Mr. Hogg. It has been assumed that the contract there in question was in fact a c.i.f. contract, and some colour is perhaps given to the assumption by the words of one of the members of the Court. (2) But in the course of his argument before me Mr. MacKinnon K.C. has produced a print of the actual contract discussed before the Divisional Court in the *Olympia Case* (1), and it is now clear beyond doubt that the bargain there in question was not a c.i.f. contract at all. On the contrary, it was possessed of certain characteristics inconsistent with and opposite to a c.i.f. bargain. The terms of the agreement were of a special nature. At the close of the case before me Mr. Hogg expressly and frankly conceded that the document in the *Olympia Case* (1) was not a c.i.f. contract, and he stated that he would not further rely on that decision as possessing any relevance to the point now before me. In view of the fullness with which that decision was discussed in argument it is perhaps desirable to add that the *Olympia Case* (1) cannot

(1) [1915] 1 K. B. 233. (2) Ibid. 237.

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now, I think, be treated as a binding decision even upon the actual terms of the contract there considered. No direct appeal was possible from the judgments I have referred to, inasmuch as the special case then before the Court was a consultative one only under s. 19 of the Arbitration Act, 1889 —see *In re Knight and Tabernacle Permanent Building Society*. (1) But the subsequent history of the dispute was remarkable. It is narrated by Scrutton L.J. in *Produce Brokers' Co.* v. *Olympia Oil & Cake Co.* (2) From the observations of Scrutton L.J. at p. 331 (which were concurred in by Lord Cozens-Hardy M.R. and Warrington L.J.) I deem it reasonably clear that in the view of the Court of Appeal the opinion of the Divisional Court (3) was incorrect. The matter before me must therefore be considered independently of that case.

The nature of a c.i.f. contract has been described by Blackburn J. in *Ireland* v. *Livingston* (4), by Lord Sumner, then Hamilton J., in *Biddell Brothers* v. *E. Clemens Horst Co.* (5), and by Kennedy L.J. in his dissenting judgment in the Court of Appeal in the same case. (6) The judgment of Kennedy L.J. was approved by the House of Lords. (7)

I conceive that the essential feature of an ordinary c.i.f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent. The position is stated with weight and clearness in the treatise on charter-parties by Scrutton L.J., 8th ed., p. 167, in the notes to article 59 as follows: "The best way of approaching the

(1) [1892] 2 Q. B. 613.
(2) [1917] 1 K. B. 320.
(3) [1915] 1 K. B. 233.
(4) (1872) L. R. 5 H. L. 395, 406-7.
(5) [1911] 1 K. B. 214, 220.
(6) [1911] 1 K. B. 934, 955.
(7) [1912] A. C. 18.

consideration of all questions on c.i.f. sales is to realise that this form of the sale of goods is one to be performed by the delivery of documents representing the goods—i.e., of documents giving the right to have the goods delivered or the possible right, if they are lost or damaged, of recovering their value from the shipowner or from underwriters. It results from this that various rules in the Sale of Goods Act, 1893, which is primarily drafted in relation to the sale and delivery of goods on land, can only be applied to c.i.f. sales mutatis mutandis. And there may be cases in which the buyer must pay the full price for delivery of the documents, though he can get nothing out of them, and though in any intelligible sense no property in the goods can ever pass to him—i.e., if the goods have been lost by a peril excepted by the bill of lading, and by a peril not insured by the policy, the bill of lading and the policy yet being in the proper commercial form called for by the contract."

In *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1), Scrutton L.J., when a judge of first instance, described a c.i.f. contract as being a sale of documents relating to goods and not a sale of goods. But when the Court of Appeal considered that case (2) Bankes L.J. and Warrington L.J. commented on the language of Scrutton J. and indicated their view that a c.i.f. contract is a contract for the sale of goods to be performed by the delivery of documents. But I respectfully venture to think that the difference is one of phrase only. For in reality, as I have said, the obligation of the vendor is to deliver documents rather than goods—to transfer symbols rather than the physical property represented thereby. If the vendor fulfils his contract by shipping the appropriate goods in the appropriate manner under a proper contract of carriage, and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights or duties of either party are affected by the loss of ship or goods, or by knowledge of such loss by the vendor, prior to actual tender of the documents. If the ship be lost prior to tender but without the knowledge of the seller it was,

(1) [1915] 2 K. B. 379, 388. (2) [1916] 1 K. B. 495, 510, 514.

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I assume, always clear that he could make an effective proffer of the documents to the buyer. In my opinion it is also clear that he can make an effective tender even though he possess at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the documents he bargained for; and if the policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract. The views I have expressed are, I feel, in full accord with the observations of Atkin J. in *C. Groom, Ltd.* v. *Barber* (1) as to the requirements of a c.i.f. contract, and with the judgment of Bailhache J. in *In re Weis & Co. and Credit Colonial et Commercial (Antwerp)*. (2) I therefore hold that the plaintiffs were not entitled to reject the tender of documents in the present case upon the ground that the *Algonquin* had, to the knowledge of the defendants, sunk prior to the tender of documents. This view will simplify the performance of c.i.f. contracts and prevent delay either through doubts as to the loss of ship or goods or through difficult questions with regard to the knowledge or suspicion of a vendor as to the actual occurrence of a loss.

In view of my decision on the first point it becomes necessary to consider the further contentions of Mr. Hogg. It is clear, of course, that the plaintiffs are not, by their rejection of the tender on an insufficient ground, precluded from supporting the rejection on other and valid grounds—see per Brett M.R. in *Sanders Brothers* v. *Maclean & Co.* (3), and per Bailhache J. in *Furness, Withy & Co.* v. *Rederiaktiebolaget Banco.* (4) The second ground upon which Mr. Hogg supported the rejection by the plaintiffs of the defendants' tender was that no policy of insurance was amongst the proffered documents. In my opinion this point is clearly valid. Under an ordinary c.i.f. contract the vendor is obviously bound to tender a proper policy of insurance together with the other documents required. This obligation is clearly indicated by the various judgments I have

(1) [1915] 1 K. B. 316.
(2) [1916] 1 K. B. 346.
(3) (1883) 11 Q. B. D. 327, 333.
(4) [1917] 2 K. B. 873, 876.

already referred to when dealing with the nature of a c.i.f. contract. The policy must be tendered even if the goods have safely arrived at the time of tender—see *Orient Co.* v. *Brekke & Howlid* (1) per Lush and Rowlatt JJ. In the present case the defendants tendered no policy of insurance at all. They merely made the following statement in their letter of March 14, 1917: "We hereby hold you covered by insurance for the amount of 4,322*l.* in accordance with the terms of policy of insurance in our possession re shipment ex s.s. *Algonquin*." This, as Mr. Hogg tersely said, was the mere assurance that a policy had been issued, and not the policy of insurance itself. It was suggested on behalf of the plaintiffs that the letter amounted either to an equitable assignment of the insurance moneys to the extent of 4,322*l.* or to a declaration of trust to such amount in respect of these moneys. Even if this suggestion be well founded yet there is a wide difference between an actual policy of insurance transferable to the defendants as contemplated by s. 50, sub. s. 3, of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), and such a letter as that of the defendants here. The plaintiffs, I hold, were clearly entitled to a policy and not to a mere assertion by the defendants that a policy existed and that the defendants would hold the plaintiffs covered.

Even if the defendants had tendered the policies actually held by them I should still have held the tender bad, for they were policies which covered a quantity of goods outside those mentioned in the bills of lading and invoices sent to the plaintiffs. In my opinion a purchaser under a c.i.f. contract is entitled to demand, as a matter of law, a policy of insurance which covers and covers only the goods mentioned in the bills of lading and invoices. This, I think, was settled by the decision of the Court of Appeal, consisting of Lord Cairns, Lord Coleridge C.J., and Mellish L.J., in the case of *Hickox* v. *Adams*. (2) Unless the purchaser gets a policy limited to his own interests he would become one only of those who are interested in the insurance; and he is entitled, in my view, to refuse to occupy a position which

(1) [1913] 1 K. B. 531. (2) (1876) 34 L. T. 404.

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may give rise to obvious complications—see per Turner L.J. in *Ralli* v. *Universal Marine Insurance Co.* (1)

I should have dealt with the above points in a few words only but for the fact that Mr. MacKinnon and Mr. G. A. Scott boldly and vigorously argued that a vendor's duty under a c.i.f. contract, whatever it may have been in former times, had been modified by recent practice amongst business men. It may be that the requirements of a c.i.f. contract can be altered by general and established custom. For inasmuch as the meaning of such a contract was created by custom, it may likewise, I presume, be altered by custom. But the evidence of a modifying custom must be clear indeed ere the well-known incidents of such a bargain as a c.i.f. contract can be changed. Here the defendants abandoned any attempt to prove a general custom which could lessen their prima facie obligations to the plaintiffs. It was, however, suggested that a usage or practice between the parties themselves had cast upon the plaintiffs the obligation to accept the letter of March 14, 1917, in lieu of an actual and appropriate policy of insurance. In my view such a contention cannot be sustained. It is true that in many prior c.i.f. transactions between the parties the plaintiffs had abstained from asking for an actual policy. The absence of objection was based on two reasons—viz., (1.) on the fact that in every such case the vessel had, in fact, arrived before the documents were tendered by the defendants; and (2.) on the further fact that the position and financial standing of the defendants were such as to render the plaintiffs undesirous of insisting on their legal rights. But the letter sent by the defendants in their previous transactions was in a wholly different form to the letter in the present case. It was as follows :—

"Dear Sirs,—

[Here are set out particulars of goods, etc.]

"We hereby hold you covered by insurance for the amount of *l.* , in accordance with the terms of Providence.

(1) (1862) 6 L. T. 34, 37.

Washington Insurance Co.'s certificate of insurance in our possession re shipment ex s.s.

"Yours very truly,

"CORN PRODUCTS CO., LTD."

The defendants, therefore, entirely fail to prove any usage between the parties which could modify their obligations under the c.i.f. contracts here in question. I need not dwell upon the incidental fact that the policies here taken out by the defendants were all f.p.a. The possible consequences of this are obvious.

The above observations suffice to dispose of the case, but two other points were argued before me. Mr. Hogg submitted that the tender in respect of the starch was in any event bad, inasmuch as the contract was for the sale of starch in 280 lb. bags, whereas the starch shipped by the defendants was, as appears from the invoice, partly in 220 lb. bags and partly in 140 lb. bags. Mr. MacKinnon argued that the words "280 lb. bags" were not a material part of the bargain. But, in my opinion, it is clear that such words were an essential part of the contract requirements. They constitute a portion of the description of the goods. The size of bags may be important to a purchaser in view of sub contracts or otherwise. A man may prefer to receive starch either in small or large or medium bags. If the size of the bags was immaterial I fail to see why it should have been so clearly specified in the contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of goods will suffice for the purposes of the purchaser: see s. 13 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); *Bowes* v. *Shand* (1) per Lord Blackburn; *Jackson* v. *Rotax Motor and Cycle Co.* (2) The tender by the defendants of starch in bags other than 280 lb. bags was a failure to comply with their contract.

The final point arose upon the fact that the defendants, in their letter of March 14, 1917, stated that they held the plaintiffs covered to the extent of 4,322*l.*—i.e., the invoice

(1) (1877) 2 App. Cas. 455, 480-1. (2) [1910] 2 K. B. 937.

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amount only of the goods comprised in the bills of lading sent to the plaintiffs. This raised a question as to the extent of a vendor's obligation to insure goods under an ordinary c.i.f. contract. At what figure is he bound to insure? As the matter is one of general and great practical importance I think it better that it should be decided in a case where it calls for direct determination.

The plaintiffs succeed for the reasons I have previously indicated, and judgment will therefore be entered in their favour for the sum of 5262*l.* with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Drake, Son & Parton.*
Solicitors for defendants: *Neve, Beck & Kirby.*

R. F. S.

1918
Nov. 15.

MANUBENS v. LEON.

Master and Servant—Contract of Service—Servant to receive Tips—Wrongful Dismissal—Compensation for Loss of Tips.

The plaintiff was employed by the defendant as a hairdresser's assistant at a weekly wage and commission on the takings. It was also an implied term of the contract that he should be at liberty to receive tips from customers. The plaintiff was wrongfully dismissed without notice:—

Held, that the plaintiff was entitled to claim as damages for the wrongful dismissal, in addition to a week's wages in lieu of notice and commission, an amount in respect of the loss of the tips which he would have received but for the wrongful dismissal.

APPEAL from Westminster County Court.

The plaintiff was employed by the defendant as a hairdresser's assistant at a weekly wage of 30*s.* and a commission on the takings. In addition, he received tips, amounting to 30*s.* a week, from the customers whom he served. The deputy county court judge found that there was no express contract with the employer as to the receipt of tips, but that the practice of receiving them was open and notorious and sanctioned by the employer, and the judge accordingly found

that it was an implied term of the contract that the plaintiff should be at liberty to receive them.

The plaintiff was wrongfully dismissed by the defendant without notice, and he thereupon claimed damages for wrongful dismissal. The defendant offered to the plaintiff, and afterwards paid into court, a sum sufficient to cover the plaintiff's claim in respect of a week's wages in lieu of notice and commission. The plaintiff, however, claimed, in addition, the estimated value of the tips which he would have received if he had not been summarily dismissed. Evidence was given that the scale of wages for hairdressers' assistants in shops where tips are not allowed is much higher than in shops where tips are allowed.

The deputy county court judge held that as this was the first instance of a claim for damages for loss of tips having been put forward, it ought to be left to a higher court to decide whether such a claim was a good one, and he accordingly decided in favour of the defendant. He, however, fixed the damages in respect of tips, if such damages were recoverable, at one day's tips at 5*s*., as the plaintiff did not use due diligence in seeking other employment.

The plaintiff appealed.

Colam K.C. and *Fortune* for the plaintiff. The deputy county court judge was wrong in holding that the tips which the plaintiff would have received if he had not been wrongfully dismissed ought not to be taken into account in estimating the damages he sustained by the wrongful dismissal. The plaintiff was entitled to be recouped for the losses which he sustained by his dismissal. The nature of his employment must be taken into consideration: *Addis* v. *Gramophone Co.* (1) It was an implied term of his contract of service that he should be allowed to receive tips from the customers whom he served, and therefore the loss of the tips must have been within the contemplation of the parties to the contract as being part of the probable result of the breach of the contract, and therefore the principles laid down in *Hadley* v. *Baxendale* (2)

(1) [1909] A. C. 488. (2) (1854) 9 Ex. 341.

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apply. It has been held in cases under the Workmen's Compensation Act, 1906, that tips may be taken into account in estimating the "earnings in the employment" where the employment is of such a nature that the habitual giving and receiving of tips is open and notorious and recognized by the employer: *Penn* v. *Spiers and Pond* (1), *Great Western Ry. Co.* v. *Helps.* (2)

[BAILHACHE J. Is an employer under such a contract as this bound to give a workman an opportunity of working, and so earning tips? If the employer is not bound to give the workman an opportunity of working, the workman is not entitled to claim compensation in respect of the tips he would probably have received.]

It is admitted that the plaintiff was entitled to commission on the takings, and therefore the defendant was bound to afford the plaintiff an opportunity of earning the commission. The same reasoning applies to the case of the tips. It was held in *In re Rubel Bronze and Metal Co. and Vos* (3) that a servant who had been prevented by his employer from exerting his opportunities to earn commission was entitled to damages.

[They were stopped.]

The defendant was not represented.

LUSH J. The question raised in this case is one of some importance. The plaintiff was employed by the defendant as a hairdresser's assistant, and he was entitled, in addition to his wages, to commission on the goods he sold to customers. He also received gratuities or tips from the persons on whom he attended. He was wrongfully dismissed by the defendant, who has admitted, by his payment into court, that he was bound to pay the plaintiff, in addition to his agreed wages, damages for the loss of the commission which he would have earned if he had not been summarily dismissed. The defendant, however, refused to recognise as an item of the plaintiff's claim to damages any claim in respect of the loss of the tips which he would have received if he had been

(1) [1908] 1 K. B. 766. (2) [1918] A. C. 141.
(3) [1918] 1 K. B. 315.

permitted to continue in the defendant's service under a proper notice. The deputy county court judge held that the defendant's contention was right, and that the plaintiff was not entitled to recover more than the loss of his wages and the loss he had incurred by reason of having been prevented from earning his commission. The question is whether or not the deputy county court judge was right in so holding. In my opinion the view which he took was wrong. The plaintiff was entitled, upon the defendant's breach of the contract, to recover for the loss he had sustained by reason of the breach, the loss being measured by, or represented by, the damages flowing from the breach within the contemplation of the parties to the contract. It was clearly within the contemplation of the parties to the contract that the plaintiff would receive these tips. The deputy county court judge found that it was an implied term of the contract that the plaintiff should be allowed to receive tips. The defendant, therefore, knew and contemplated, when the contract was entered into, that if it should be broken by the plaintiff being summarily dismissed, the plaintiff would sustain a loss in respect of tips which he would otherwise have received. I do not say that the defendant undertook to allow the plaintiff to cut the hair of customers, but the contract was that the defendant would not prevent the plaintiff from receiving the remuneration which he would have received in the ordinary course if he fulfilled the duty for which he was engaged. The plaintiff was therefore entitled to add to his claim for damages the item in dispute, inasmuch as the defendant prevented him from performing his duty and earning the tips, and thus broke his contract with the plaintiff, and part of the damages to which the plaintiff was entitled was an amount in respect of the loss of these tips. The appeal must be allowed and judgment entered for the plaintiff.

BAILHACHE J. I am of the same opinion.

Appeal allowed. Judgment for plaintiff.

Solicitors for plaintiff: *Corbin, Greener and Cook.*

R. F. S.

1918
Nov. 19.

LINDSAY *v.* QUEEN'S HOTEL COMPANY, LIMITED.

Master and Servant—Month's Notice by Servant terminating service—Wrongful dismissal during Currency of Notice—Measure of Damages.

The rule that the damages recoverable by a domestic servant for wrongful dismissal are a month's wages without board wages does not apply where the servant is wrongfully dismissed during the currency of a month's notice given by the servant to terminate the service. In that case the damages recoverable are the actual pecuniary loss sustained, and will include compensation for the loss of board and lodging during the period between the date of the wrongful dismissal and the date when the service would have terminated under the notice.

Appeal from Cheltenham County Court.

The plaintiff was a domestic servant. She entered the defendants' service in January, 1918. On January 31 she was paid the wages then due to her. On February 4 she gave a month's notice to leave the defendants' service. On February 26 the defendants' manager summarily dismissed the plaintiff on the ground of alleged misconduct. The plaintiff claimed in this action damages for wrongful dismissal. The county court judge found as a fact that the dismissal of the plaintiff was wrongful, and he gave judgment for the plaintiff for one month's wages, in addition to the amount due for wages from February 1 to March 4, which latter amount the defendants had paid into court.

The defendants appealed.

R. A. Willes for the defendants. The plaintiff was not entitled to recover a month's wages as damages for the wrongful dismissal. She is entitled to be placed in the same position as if she had not been wrongfully dismissed, but as the contract of service would in any event have terminated on March 4 by reason of the notice given by the plaintiff, she can recover no more than her wages up to that date.

Dyer for the plaintiff. It is immaterial that the plaintiff had given a month's notice before the dismissal. The contractual relationship was still existing at the date when the plaintiff was dismissed, and the case falls within the ordinary

rule as to the damages payable to a domestic servant who is wrongfully dismissed, that is to say, the damages are by custom one month's wages: *Turner* v. *Mason*. (1) But if in the circumstances of this case the damages are at large, the plaintiff is entitled to compensation for the loss of board and lodging which she would have received if she had remained in the defendants' service until March 4. [He also referred to *In re Rubel Bronze and Metal Co. and Vos*. (2)]

Willes in reply. A domestic servant who is wrongfully dismissed cannot recover anything for loss of board and lodging: *Gordon* v. *Potter* (3), *French* v. *Brookes*. (4)

BRAY J. This case raises a question of some general importance. The plaintiff, who was in the service of the defendants as a domestic servant, gave a month's notice to terminate the service. Before the month had expired she was summarily dismissed without justification. The question is, what damages is the plaintiff entitled to recover for that wrongful dismissal? The county court judge held that the plaintiff was entitled to a month's wages in addition to the wages due to her. There is a custom that the damages ordinarily recoverable by a servant who has been wrongfully dismissed are a month's wages, and the reason is that a master has the right by custom to dismiss a servant at any time on payment of a month's wages, in addition to whatever is due for wages. But in this case by reason of the notice which the plaintiff herself had given, the contract of service would in any event have terminated six days after the date when the plaintiff was dismissed. I do not think that there is any law or custom by which the ordinary rule of a month's wages as damages applies to a case of this sort. I think the damages must be ascertained according to the principles applicable to any other case of wrongful dismissal, that is to say, the damages are the actual pecuniary loss which has been sustained. Then, what was the plaintiff's loss? She has lost the value of six days' board and lodging, in addition to wages up to March 4. It was contended on

(1) (1845) 14 M. & W. 112.
(2) [1918] 1 K. B. 315.
(3) (1859) 1 F. & F. 644.
(4) (1830) 6 Bing. 354.

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the authority of *Gordon* v. *Potter* (1) that a servant who is wrongfully dismissed is not entitled to anything for board and lodging. The reason is, as I have already said, that a master may at any time avail himself of his right to dismiss his servant on payment of one month's wages, and therefore the servant cannot recover more than that if she is summarily dismissed without payment. But as the damages in the circumstances of this case are not governed by the custom as to one month's wages, but are the actual loss sustained, it is right, in my opinion, in ascertaining the amount of that loss to take into consideration the fact that the plaintiff has lost six days' board and lodging. For these reasons I am of opinion that this appeal should be allowed.

AVORY J. I am of the same opinion. The question is whether the county court judge was right in holding that in the circumstances of this case the damages must be a liquidated sum, namely, the amount of one month's wages. I agree that the custom that the damages for the wrongful dismissal of a domestic servant are one month's wages does not apply to a case where the wrongful dismissal occurs during the currency of a month's notice given by the servant.

Appeal allowed. (2)

Solicitor for plaintiff: *Alfred T. Ivens, Cheltenham.*

Solicitors for defendants: *Iliffe, Henley & Sweet, for P. Haddock, Cheltenham.*

F. O. R.

(1) 1 F. & F. 644.

(2) In order to avoid the necessity for a new trial counsel agreed to leave it to the Court to decide the amount of the damages to be awarded to the plaintiff. The Court awarded 18s., in addition to the wages down to March 4.—F. O. R.

REYNOLDS, Appellant *v.* BEASLEY and Another, Respondents.

1918
Nov. 25.

Railways—Travelling without having previously paid Fare—Intent to avoid Payment of Fare—Purchase of Ticket from another Passenger—Regulation of Railways Act, 1889 (52 & 53 *Vict. c.* 57), *s.* 5.

By s. 5, sub-s. 3 of the Regulation of Railways Act, 1889: "If any person (*a*) travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof . . . . he shall be liable on summary conviction to a fine":—

Held, that the words "paid his fare" in the statute meant "paid his fare to the railway company," and that therefore a person who had purchased a workman's ticket, marked "not transferable," which had been issued by a railway company to another person, from that person, and had travelled on the railway without having purchased a ticket from the railway company, had travelled on the railway "without having previously paid his fare, and with intent to avoid payment thereof" within the meaning of the statute.

Case stated by Justices for the County of Bucks.

The respondent Beasley was charged upon an information preferred by the appellant Reynolds with having on March 16, 1918, unlawfully travelled upon the Great Western Railway without having previously paid his fare, and with intent to avoid payment thereof. The respondent Bond was charged with having aided and abetted the respondent Beasley to commit the offence.

Upon the hearing of the informations on May 1, 1918, the following facts were admitted or proved:—

The appellant was a detective police officer of the Great Western Railway Company.

The respondents were both employed at Government munition works at Hayes, Middlesex.

Certain tickets, called workmen's tickets, available between Windsor and Hayes for a period of one week, and marked "not transferable," were issued by the Great Western Railway Company. Bond was the holder of a workman's weekly ticket for the week ending March 16, 1918.

On March 16 Bond sold to Beasley, for the sum of sixpence, his workman's weekly ticket available to and from Windsor

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and Hayes on the Great Western Railway Company's line. On the same day Beasley travelled from Windsor to Hayes without purchasing a ticket for the train by which he travelled, and at Hayes Station gave up half the weekly ticket which he had purchased from Bond. The same day he travelled back from Hayes, and at Slough Station presented to the ticket collector the other half of the ticket, and could produce no other.

The ticket in question was printed as a weekly ticket available for a workman for one journey each way once a day by certain trains. It was not prepared for dividing into half. It was required to be shown intact for each journey, and would in the ordinary course be collected at the end of the week for which it was available—viz., on March 16. The presentation of part only of the ticket caused inquiries to be made.

The ticket in question was issued at the Windsor booking office of the Great Western Railway at the reduced fare of 3*s.*, equalling 6*d.* per double journey. It was not transferable, and was so marked. The ordinary return fare between Windsor and Hayes was 2*s.* 7½*d.* A daily workman's ticket was issued at a cost of 6*d.* on production of a munition worker's identity card.

The respondent Beasley contended (1.) that the amount he paid for the unexpired period of the weekly ticket equalled the fare he would have paid for a daily workman's ticket; (2.) that he did not know that the ticket was not transferable; (3.) that he had no intention to defraud the railway company; (4.) that he had been in the habit of taking a daily workman's ticket and giving up half of the same on the outward journey.

For the appellant it was contended (1.) that the respondent Beasley travelled on the company's line of railway without having paid his fare within the meaning of the Regulation of Railways Act, 1889, s. 5, sub-s. 3 (a); (2.) that the purchase by the respondent Beasley of a workman's ticket "not transferable" and so marked elsewhere than at a booking office of the railway in law constituted an intent to avoid payment of his fare within the meaning of the statute. In support of these contentions the appellant referred to *Langdon* v. *Howells*. (1)

(1) (1879) 4 Q. B. D. 337.

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The justices were of opinion that no intention to avoid payment of his fare within the meaning of s. 5 of the Regulation of Railways Act, 1889, had been disclosed against the respondent Beasley, as he had actually paid an amount equal to the fare which he would have been charged for the journey taken if he had obtained a daily workman's ticket. They accordingly dismissed both informations.

Schiller K.C. and *Bartley* for the appellant. The words in s. 5, sub-s. 3 (a) of the Regulation of Railways Act, 1889, "Without having previously paid his fare, and with intent to avoid payment thereof" mean "without having paid his fare to the railway company, and with intent to avoid payment thereof to the railway company." The sale by Bond of the ticket to Beasley who used it and travelled on the railway without having paid the railway company came within the mischief aimed at by the statute. [They were stopped.]

The respondents were not represented.

DARLING J. The respondent Beasley was prosecuted under s. 5, sub-s. 3 of the Regulation of Railways Act, 1889, for having travelled upon the Great Western Railway without having previously paid his fare and with intent to avoid payment thereof. That section provides that "if any person travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof," he shall be guilty of an offence. In my opinion when the respondent Beasley travelled on the railway on March 16, 1918, he travelled without having paid his fare. I think that the words "without having paid his fare" mean "without having paid his fare to the railway company." He had not done that; he had not paid the railway company anything; he had paid sixpence to the respondent Bond who had handed over to him a workman's weekly ticket which he (Bond) had bought from the Great Western Railway Company, but which was not transferable, and which was marked "not transferable." In my opinion it is no defence for the respondent Beasley to say that although he had not paid anything to the

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railway company yet he had paid someone else who had paid the railway company so as to entitle that person to have a ticket marked not transferable; in other words, that he had bought a ticket from a person who had no right to part with it. If he travelled with that ticket he travelled without having any right to do so, because although he had bought the ticket from another person he had not paid his fare to the railway company, and he had therefore travelled with intent to avoid payment of his fare to the railway company. It appears to me that there is good reason for the view I am taking because these workmen's tickets are issued by the railway company at a reduced rate; and if it were held that what the respondents did was permissible it would be impossible to inquire into the condition of the people who buy the tickets in order to ascertain whether they are entitled to them as workmen, and people to whom the tickets are issued at reduced rates might part with them to persons able to pay the full fare, and who ought, according to the law. to do so. I therefore think that the justices were wrong. The appeal must be allowed and the case sent back to the justices with a direction to convict.

LORD COLERIDGE J. I agree.

SHEARMAN J. I agree. The essence of the offence created by the sub-section is the intent to avoid payment of the fare. That obviously means the intent to avoid payment of the fare to the railway company, and it was no answer for the respondent Beasley to say that although he had not paid the railway company nevertheless he had paid someone else for the ticket. The object in buying the ticket from the other person clearly was to avoid paying his fare to the railway company. The justices ought therefore to have convicted.

Appeal allowed.
Case remitted.

Solicitor for appellant: *L. B. Page.*

R. F. S.

JONES, Appellant *v.* BITHELL and Another, Respondents.

1918
Dec. 11.

Railway—Means of Communication between Passengers and Servants of Company—Passengers using without reasonable and sufficient Cause—Train travelling more than Twenty Miles without stopping—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 22.

By the Regulation of Railways Act, 1868, s. 22: "Every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping, such efficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade may approve. . . . . Any passenger who makes use of the said means of communication without reasonable and sufficient cause shall be liable for each offence to a penalty":—

Held, that any passenger who makes use of the means of communication without reasonable and sufficient cause commits an offence under the section, irrespective of the distance which the train travels without stopping.

Case stated by justices for the County of Denbigh.

An information was preferred by the appellant against the two respondents under s. 22 of the Regulation of Railways Act, 1868 (1), for having on May 1, 1918, unlawfully and wilfully and without reasonable and sufficient cause, made use of the means of communication between the passengers and the servants of the company provided on a certain train on the Great Western Railway.

Upon the hearing of the information on June 21, 1918, the following facts were proved or admitted:—Both the respondents, who were 16 years of age, were on May 1, 1918, travelling as passengers in a train on the Great Western Railway. Means of communication in good working order

(1) Regulation of Railways Act, 1868, s. 22: "After the first day of April, 1869, every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping, such efficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade may approve. If any company makes default in complying with this section it shall be liable to a penalty not exceeding ten pounds for each case of default. Any passenger who makes use of the said means of communication without reasonable and sufficient cause shall be liable for each offence to a penalty not exceeding five pounds."

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as prescribed by the Regulation of Railways Act, 1868, were provided by the Great Western Railway Co. between the passengers and the servants of the company in charge of the train in which the respondents were travelling. The train did not travel more than 20 miles without stopping. It was billed in the company's time bills to start from Oswestry to run to Wrexham and no further, stopping at all intermediate stations, none of which are more than five miles apart. The respondents on the day aforesaid interfered with the means of communication between the passengers and the servants of the company on the train.

The justices were of opinion that s. 22 of the Regulation of Railways Act, 1868, did not apply to that train, and thereupon dismissed the information against both the respondents.

Schiller K.C. and *Bartley* for the appellant. The justices appear to have thought that because the train did not travel more than 20 miles without stopping the railway company were not bound to provide means of communication, and that therefore s. 22 of the Regulation of Railways Act, 1868, did not apply. It was held in *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (1) that the section applies to every passenger train which is intended to travel more than 20 miles without stopping. It is true that a railway company is not bound to provide means of communication in trains which travel less than 20 miles without stopping, but in fact they provide means of communication in all trains carrying passengers, otherwise they would have to provide double rolling stock. The obligation imposed by the section upon passengers is not to make use of the means of communication provided in the train without reasonable and sufficient cause, and this obligation is irrespective of the distance which the train travels without stopping. If the decision of the justices is correct the result will be serious because the modern means of communication, when used, automatically stops the train, and any passenger would be able to stop the train as often as he pleased without being liable to a penalty provided that the train in

(1) (1873) L. R. 8 Ex. 283.

that portion of its journey was not intended to travel more than 20 miles without stopping, even if in other portions of its journey it might travel more than 20 miles without stopping.

The respondents were not represented.

DARLING J. I think this appeal must be allowed. A railway company is bound under s. 22 of the Regulation of Railways Act, 1868, to provide in every train which carries passengers means of communication between the passengers and the servants of the company in charge of the train provided the train travels more than 20 miles without stopping. But a passenger who makes use of the apparatus so provided without reasonable and sufficient cause is guilty of an offence and liable to a penalty. Now it is quite possible, having regard to the way in which railways are worked, for a train on certain portions of its journey to run more than 20 miles without stopping, and on other portions of its journey to stop several times within a distance of 20 miles. The train in which the respondents were travelling stopped at stations which were not more than five miles apart. It seems to me that the statute must be construed for the public benefit and not too narrowly. The justices put an extremely narrow construction upon it, because they practically said that if a train does not travel more than 20 miles without stopping passengers in the train may use the means of communication, which, when used, automatically stops the train, and so stop it as often as they please without being liable to any penalty. The result would be that any passenger who wanted to leave the train could stop the train anywhere regardless of what might be behind the train or of the ordinary requirements of the traffic, and as the apparatus acts automatically he would not merely give a signal, but would stop the train itself possibly in the most dangerous situations. It appears to me therefore that it would be against public policy to construe the section in the way in which the justices have construed it. The meaning of the section is that a railway company must provide this apparatus in certain trains—namely, those carrying passengers travelling more than 20 miles without stopping—or be liable to a penalty. The company, however, is not bound to provide

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the apparatus in trains which do not travel more than 20 miles without stopping. In fact, railway companies do provide the apparatus in all passenger trains because a train in performing certain journeys might run more than 20 miles without stopping, in which case it would be absolutely necessary that the apparatus should be provided. If, however, the apparatus is provided the passengers are bound not to use it without reasonable and sufficient cause, and in my opinion it is immaterial whether the apparatus is provided by a railway company in a particular train, in compliance with the requirements of the statute or in the ordinary course of their business having regard to the necessities of the traffic.

AVORY J. I am of the same opinion. The justices appear to me to have overlooked the fact that s. 22 of the Regulation of Railways Act, 1868, consists of two parts, one of which imposes an obligation upon the railway company to provide this means of communication between passengers and those in charge of the train in certain passenger trains—namely, those travelling more than 20 miles without stopping. The second part of the section imposes an obligation upon passengers not to make use of those means of communication without reasonable and sufficient cause, and provides that if they do make use of the means of communication without reasonable and sufficient cause they shall be liable to a penalty. The justices held that s. 22 did not apply to this particular train. It may be quite true that the first part of the section did not apply to it, in the sense that the railway company were not bound to provide the means of communication in this particular train, but that is no reason for holding that the second part of the section does not apply to a passenger who in fact makes use, without reasonable and sufficient cause, of the means of communication that have been provided in the train. I therefore think that the decision of the justices was quite wrong.

SALTER J.: I am of the same opinion.

Appeal allowed.
Case remitted.

Solicitor for appellant: *L. B. Page.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.
1918
July 19, 22;
Nov. 18.

DERRY *v.* SANDERS.

Copyhold—Right of Way—Custom of Manor—Enfranchisement.

The plaintiff and the defendant owned adjoining land. The plaintiff's land had been copyhold of the manor of L. for a customary estate of inheritance, but in 1897 it was enfranchised, not under the Copyhold Acts, but at common law, the deed of enfranchisement containing no reservation of any right of way. The defendant's land, which was part of the demesne land of the same manor of L., was held by the defendant and his predecessors as tenants from year to year till 1914, when the freehold was purchased by the defendant. For eighty years the defendant and his predecessors had used a way, which was not a way of necessity, over the plaintiff's land. In an action for trespass brought by the plaintiff against the defendant for using this way, the defendant claimed that he had acquired, by the eighty years' user, a right to the way:—

Held (1.) that in view of the rule that a legal origin must be presumed if such an origin is possible, the length of user of the way by the defendant and his predecessors was sufficient to found a presumption that a custom existed in the manor of L. whereby a right of way could be acquired over land within the manor as appurtenant to other land within the manor; but (2.) that even if such a right existed, it was extinguished upon the enfranchisement of the plaintiff's land without any reservation of the right of way being contained in the deed of enfranchisement.

APPEAL from the Divisional Court.

The plaintiff sued the defendant in the Lichfield County Court, claiming (1.) damages for trespass, and (2.) an injunction to restrain the continuance of the acts complained of.

The plaintiff and the defendant were owners of adjoining land. The plaintiff's land had been copyhold, and had been held according to the custom of the manor of Longdon, in the county of Stafford. The plaintiff's title was as follows: One Ingram, who had been seised of the land according to the custom of the manor for a customary estate of inheritance in possession, free from incumbrances except the rents, fines, suits and services thereto due and of right accustomed, died in 1878. His representative bargained and sold the land to one Bayley, who was in 1880 duly admitted tenant of the land, to hold the same according to the custom of the

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manor. On September 27, 1897, Bayley's devisee was admitted tenant; on September 28, 1897, the Marquess of Anglesey, the tenant for life in possession of the manor of Longdon, executed a deed by which, in consideration of the sum of 21*l.* 13*s.* paid by Herbert Russell, the trustee under Bayley's will, as beneficial owner in exercise of the powers conferred on him by the Settled Land Act, 1882, and of every other power enabling him in that behalf, enfranchised, conveyed, and released unto the said Herbert Russell the premises in question, save and except the mines and minerals, to hold them unto, and to the use of, the said Herbert Russell, his heirs and assigns, freed and discharged from the copyhold tenure thereof, and from all manner of yearly and other payments, rents, quit rents, chief rents, copyhold or customary rents, fines, heriots and customary payments, suits and services in respect thereof. On September 29, 1897, the said Herbert Russell conveyed the land to the plaintiff.

The land belonging to the defendant, which was part of the demesne of the manor of Longdon, had been in the occupation of his father for forty years till 1888 as a tenant from year to year, in the occupation of his mother from 1888 to 1912 as a tenant from year to year, and in his own occupation as a tenant from year to year till May 7, 1914, when the Marquess of Anglesey, as beneficial owner, conveyed the fee to the defendant, excepting and reserving all mines and minerals in or under the land.

The plaintiff brought the present action in respect of a trespass in April, 1917, by the defendant on a roadway upon the plaintiff's land which extended from the boundary of the defendant's land to a highway called Megg's Lane. The defendant pleaded that he had, under the Prescription Acts, a right of way, appendant or appurtenant to his land, over the roadway. It was found, as a fact, that the defendant and his predecessors had used the roadway for eighty years, but the county court judge was of opinion that the road was not a way of necessity, and found that the defendant had not established a prescriptive right to the way, because, in respect of both the alleged dominant and servient tenements,

there had been unity of title in the Marquess of Anglesey up to September 28, 1897.

On appeal to the Divisional Court the judges differed. Lawrence J. said that it was contended for the plaintiff: first, that no right of way could be acquired by prescription over copyhold lands either by another copyholder or by the lord of the manor; secondly, that the deed of enfranchisement of September 28, 1897, as it contained no express reservation of the right of way, had the effect of extinguishing it, assuming it then existed. In his opinion both these arguments were erroneous. Large areas of England and Wales were, or had been, included in manors, and to say that easements could not exist in respect of one copyhold tenement over another, or in respect of the demense lands over a copyhold tenement, was as contrary to experience as it was to law. The copyhold tenants of the plaintiff's land were tenants in fee simple according to the custom of the manor, and were granted seisin of the tenement to hold to their heirs and assigns for ever upon every admittance. The only proprietary right remaining in the lord was a qualified property in the minerals and timber. The soil of the roadway in question was the sole property of the copyhold tenant; the lord, as such, had no interest therein; his seignorial right to rents, fines and services were the only present interest which he had in the tenement. There was no ground for saying that the copyholder of eighty years ago could not—by express grant or by acquiescence in the exercise of the way under a claim of right for the prescribed period—have conferred upon the owners of the defendant's land the right of way in question. The old rule that the prescription must have been laid in the person who was seised in fee of the que estate could always have been satisfied here, for the landlord of the defendant's tenement was seised in fee throughout the eighty years, and from the creation of the manor of which it formed part of the demesne lands. With regard to the second point, he rejected the contention that because the deed of enfranchisement contained no reservation of the right of way, the right, if it existed, was extinguished.

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The right of way was incident to the defendant's tenement, and the deed did not deal, or purport to deal, with the defendant's tenement or with any right incident, appendant, or appurtenant thereto. The doctrine of derogation from grant, which was invoked, did not apply; it only applied when the right in question was in the grantor at the time of the grant, and in this case the right in question was not in the lord.

Lush J. was of opinion that, assuming that the right of way ever was acquired, it was extinguished by the enfranchisement of the plaintiff's land. By the deed the lord not merely released his seignorial rights; he conveyed the estate of inheritance, the entire interest in the land, to hold to the use of the grantee, his heirs and assigns, freed and discharged from the copyhold tenure. If the lord had intended to reserve the right of way he must have done so expressly. No way, not being a way of necessity, was reserved by implication. The defendant only became tenant in 1912 after the conveyance to Russell, and neither then, nor when he purchased the fee in 1914, was any right of way granted to him. There was no derogation, therefore, of any right that he had had, and he never acquired any right of way for himself.

As the judges differed the appeal was dismissed.

The defendant appealed.

F. C. A. Barrett-Lennard for the defendant. The county court judge was wrong in holding that the lord of the manor was in possession of the land occupied by the copyholder, and that the copyhold tenant was not. The tenant is in possession: *Eardley* v. *Granville*. (1) The lord can prescribe for, or acquire by the custom of the manor, an easement against a copyholder, and a copyholder can similarly acquire an easement against the lord: *Hilton* v. *Earl Granville*. (2) It is said that the failure to reserve the right of way by the enfranchisement deed destroyed the right, and for that proposition reliance is placed on *Wheeldon* v. *Burrows* (3);

(1) (1876) 3 Ch. D. 826, 832. (2) (1844) 5 Q. B. 701.
(3) (1879) 12 Ch. D. 31.

but there the vendor was in occupation of both parcels of land. Here the lord was not in occupation of the lands; the property only was in him. Lord Anglesey could not enfranchise the servient tenement so as to free it from the right of way: *Thomas* v. *Owen* (1); *Richardson* v. *Graham*. (2) The lord cannot derogate from his grant of the dominant tenement. The right of way was appurtenant to the land, and the lord can no more extinguish the easement acquired by the tenant than he can extinguish the lease. He cannot deal with the land demised so as to destroy a right of way attached to it. Enfranchisement only affects the incidents of tenure: *Massam* v. *Hunter* (3), cited in *Baring* v. *Abingdon* (4); *Emson* v. *Williamson* (5); *Rich* v. *Barker*. (6) This was an enfranchisement at common law, and not under the Copyhold Act, 1894 (57 & 58 Vict. c. 46). Even if the lord could extinguish the easement the Court would not presume an intention by him to do so. It must be assumed that the lord in the deed of enfranchisement reserved the right of way for the benefit of the dominant tenement. If the Court is doubtful as to the effect of the deed the course of practice since the deed can be looked at. [*Attorney-General* v. *Tomline* (7) was also referred to.]

Disturnal K.C. (*Sandlands* and *Lipson Ward* with him) for the plaintiff. The county court judge was right in holding that the defendant's claim to a right of way is not maintainable in law. To adopt the language of Collins M.R. in *Kilgour* v. *Gaddes* (8), the claim "is inconsistent with the essential notion of a right by prescription, namely, that the right is acquired by the owner of land over land belonging to another owner." In that case the plaintiff and the defendant were lessees of adjoining land holding under the same landlord, and it was decided that an easement, such as a right of way, could not, under s. 2 of the Prescription Act, 1832, be acquired by the defendant by user over the land occupied by the plaintiff, even if that user had existed for the period of forty

(1) (1887) 20 Q. B. D. 225.
(2) [1908] 1 K. B. 39.
(3) (1610) Yelv. 189.
(4) [1892] 2 Ch. 374, 383.
(5) (1598) 1 Rolle's Abr. 933.
(6) (1658) Hardres, 131.
(7) (1877) 5 Ch. D. 750, 763.
(8) [1904] 1 K. B. 457, 461.

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years. That decision is precisely in point. Till 1914 the defendant and his predecessors were tenants from year to year of the alleged dominant tenement from Lord Anglesey, while the alleged servient tenement was, till the deed of enfranchisement in 1897, held by the plaintiff's predecessors in accordance with the custom of the Manor of Longdon—that is, at the will of the lord: see *Barwick* v. *Matthews*. (1) There was thus unity of title of both tenements in Lord Anglesey, and no way could have been acquired by the defendant and his predecessors as of right: *Davies* v. *Williams*. (2) The argument for the defendant involves that the lord would be prescribing against himself. No right of way can be granted by a copyhold tenant. It appears now to be suggested that the right of way could be acquired by the custom of the manor. As to that, no evidence was given in the county court in support of such a custom. But even if the right claimed ever existed it was extinguished by the enfranchisement of the plaintiff's land without any reservation of the way. If the lord intended to reserve the right of way, he should have done so expressly: *Suffield* v. *Brown* (3); *Wheeldon* v. *Burrows*. (4) *Thomas* v. *Owen* (5), which is relied upon by the plaintiff, has no application in this case. There the Court was dealing with a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement; and in those circumstances it was held that there was an implied reservation of the right of way. As was said by Wills J. in *Gordon* v. *Ogilvie* (6), there is nothing in *Thomas* v. *Owen* (5) to indicate any departure from the principle laid down in *Suffield* v. *Brown* (7) and *Wheeldon* v. *Burrows*. (8) [*Bright* v. *Walker* (9) and *Potter* v. *North* (10) were also referred to.]

Barrett-Lennard in reply referred to *Robinson* v. *Duleep Singh*. (11) *Cur. adv. vult.*

Nov. 18. LORD STERNDALE P. I think this appeal should

(1) (1814) 5 Taunt. 365.
(2) (1851) 16 Q. B. 546, 559.
(3) (1863) 4 D. J. & S. 185.
(4) (1879) 12 Ch. D. 31.
(5) (1887) 20 Q. B. D. 225.
(6) (1899) 15 Times L. R. 239.
(7) 4 D. J. & S. 185.
(8) 12 Ch. D. 31.
(9) (1834) 1 C. M. & R. 211.
(10) (1669) 1 Wms. Saund. 349, n. 11.
(11) (1878) 11 Ch. D. 798.

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be dismissed on the ground given by Lush J., that the right of way, if it existed, was extinguished by the enfranchisement of the respondent's land. I do not propose to give a detailed judgment, because I have had an opportunity of reading, and I entirely agree with, the judgments about to be read by the other members of the Court.

With regard to the first point argued before us—namely, whether a right of way was in fact and in law acquired in this case—I agree that a right of way can be acquired by the custom of the manor. Whether in this case the evidence established a right of way by custom I express no opinion, because I am not altogether satisfied that evidence which would establish a right of way by prescription would necessarily establish a right of way by the custom of the manor. Before the county court judge the point of acquiring the right by the custom of the manor was not discussed. His attention was not drawn to it, nor was the evidence directed to it. I do not say that the evidence did not establish it; I prefer to express no opinion upon it.

BANKES L.J. read the following judgment: This is an unfortunate dispute between two adjoining landowners with regard to the right of the appellant to a way over the respondent's land. Both properties are small. The respondent owns a cottage with a little over six acres of land, on part of which some buildings have been erected. The appellant owns a cottage with about eight and a half acres of land. The two properties adjoin, and are apparently divided by a hedge. The appellant's property lies to the south and west of the respondent's property. A road called Megg Lane runs along the whole length of both properties on their northern boundary. The disputed way is apparently a defined track running alongside the fence which divides the two properties on the eastern side of the respondent's property, and it forms the access to the respondent's buildings from Megg Lane. The county court judge has purposely omitted from his note all the evidence given in the case, as he did not think that it would assist the Court. I feel that I should have

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liked to know more about the facts, as they might have thrown some light upon the matter. All that can be said with certainty upon the materials before the Court is that the way which is claimed by the appellant is in no sense a way of necessity. At best it is only a short cut to Megg Lane; and there is apparently no reason why the appellant, if he wished to take a short cut instead of going round by the road, should not go along his own side of the dividing fence, instead of using the track on the respondent's side of the fence. There is no evidence as to whether there is any defined track on the appellant's land leading up to the point in the hedge through which the alleged way must pass; nor is there any evidence as to whether there was any gate in the hedge, or whether the way claimed was a footway or a carriage way. It appears from the particulars of claim that the respondent was complaining of the appellant having taken down and removed part of his hedge, as well as of the trespass on his land. It appears from the notice of defence that the appellant claimed a right of way under the Prescription Acts. The county court judge before whom the action was tried found that there had been a user by the appellant and his predecessors of the road in question for more than sixty years; in fact, for about eighty years. It was proved at the trial that both properties had at one time formed part of the manor of Longdon, the respondent's property having been copyhold of the manor, the appellant's property having been part of the demesne lands held on a yearly tenancy by successive members of the appellant's family. The respondent's property was enfranchised by deed dated September 28, 1897, whereby the lord of the manor, as beneficial owner, conveyed and released the property freed and discharged from the copyhold tenure thereof. The only exception or reservation contained in the deed was of the mines and minerals within or under the property. At the date of this enfranchisement the appellant's mother was tenant from year to year of the appellant's property, and she continued as such tenant until her death in October, 1912. The appellant succeeded his mother, also as a yearly

tenant, and so continued until May 7, 1914, when he purchased the property from the lord of the manor.

The respondent's case is that the claim of the appellant to the right of way in question is one which cannot lawfully be made at common law, either by custom, prescription, or grant, and as a consequence that the defence under the Prescription Acts must fail. It is also contended on his behalf that the alleged right of way, if it ever existed, was extinguished by the enfranchisement of the alleged servient tenement in 1897. The first contention is based on two grounds: first, that the alleged servient tenement having been during the whole period of the user of the way copyhold of the manor, no tenant of the copyhold could have made a grant of the alleged right of way owing to deficiency of estate; and secondly, that unity of title of both the alleged dominant and the alleged servient tenements having always been in the lord of the manor, no way over the servient tenement could have been acquired as of right. It is no doubt true that a tenant for years, or for life, could not make a grant of a right of way over land in his occupation by virtue of his interest as such tenant. He could not bind the inheritance: *Daniel* v. *North*. (1) One question, however, in the present case is whether a tenant by the copyhold is in the same position. In Williams on Real Property, 21st ed., at p. 450, the position of the copyholder is stated thus: "An estate in copyholds is not a freehold; but in construction of law merely an estate at the will of the lord of the manor"; and at p. 458 he says that tenants by the copyhold "may have estates of inheritance by the custom, though they have no freehold at common law." For this latter proposition he cites Littleton, ss. 76, 77, 81, 82.

In *Eardley* v. *Granville* (2) Jessel M.R. states the position of the copyholder thus: "The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout. . . . . The possession is in the copyholder; the property is in the lord."

I think that there is considerable ground for saying that

(1) (1809) 11 East, 372. (2) 3 Ch. D. 832.

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a tenant by the copyhold where by the custom of the manor his estate is an estate of inheritance has a sufficient estate to support a grant by him of a right of way over his copyhold lands. Even assuming this not to be so, it has certainly been held that in the case of an alleged public right of way over copyhold lands a long period of user of the way by the public affords a sufficient presumption that the lord of the manor joined with the tenant by the copyhold in the necessary act of creating the right of way: *Powers* v. *Bathurst*. (1) See also per Le Blanc J. in *Daniel* v. *North* (2) with regard to the case of a tenant for years granting a right of way over his land. If this is so with regard to a public right of way over copyhold land it must also be so, I think, with regard to private rights of way appurtenant to lands situate outside the manor. In these ways possibly some of the rights of way referred to by Lawrence J. in his judgment may have come into existence. The difficulty in the present case arises from the fact that the alleged dominant tenement is within the manor and part of the demesne lands held on a yearly tenancy of the lord. It was said, and in my opinion truly said, that even if the tenant of the alleged servient tenement could have validly created a right of way as appurtenant to the alleged dominant tenement it must have been acquired for the landlord of the alleged dominant tenement who was the lord of the manor, and thus there must have been unity of title in respect of both tenements in the same person. Under these circumstances it was said no way could have been created as of right.

The rule has been stated in different language in a number of cases. In *Roe* v. *Siddons* (3) Fry L.J. states it thus: "Of course, strictly speaking, the owner of two tenements can have no easement over one of them in respect of the other. When the owner of Whiteacre and Blackacre passes over the former to Blackacre, he is not exercising a right of way in respect of Blackacre; he is merely making use of his own land to get from one part of it to another." Lord Esher

(1) (1880) 42 L. T. 123. (2) 11 East, 375.
(3) (1888) 22 Q. B. D. 224, 236.

in *Metropolitan Ry. Co.* v. *Fowler* (1) says that a man cannot have an easement in his own land. The same rule was applied where a tenant claimed a right of way under the Prescription Acts over land occupied by another tenant under the same landlord: *Kilgour* v. *Gaddes*. (2) It may some day have to be decided whether this rule ought to be applied as between a tenant of demesne land of the manor as against a tenant of copyhold land in the same manor, but it does not appear necessary for the decision of this appeal to express any opinion upon this point. At present the authorities appear to be against the possibility of one tenant of a manor acquiring any rights of way by prescription (apart from custom) over the land of another tenant of the manor whether copyhold or not. I entertain no doubt that by the custom of any particular manor rights of way may be acquired over portions of land within that manor as appurtenant to other portions of land within the same manor, and that where such a custom prevails it is immaterial that unity of title is in the lord of the manor in respect of both the dominant and the servient tenements. I can find no case expressly deciding this point, but if a right of church way for all the inhabitants of a parish can be supported upon immemorial custom—*Brocklebank* v. *Thompson* (3)—I see no reason why such a custom as I have indicated should not prevail in a manor. If so, it affords another method by which the rights of way referred to by Lawrence J. may have come into existence. In view of the rule that a legal origin must be presumed, if such an origin is possible, I think that the length of user in the present case of the disputed way is sufficient to found the presumption that the necessary custom existed in the manor of Longdon.

This conclusion does not, however, dispose of all the difficulties in the appellant's way. I can find no authority upon the point, but, as at present advised, I am unable to see how, even if such a custom existed in the manor, it could operate so as to bind land after it ceased to form part of the manor. The custom, if it existed, could only be a

(1) [1892] 1 Q. B. 165, 171. (2) [1904] 1 K. B. 457.
(3) [1903] 2 Ch. 344.

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custom applicable to land if and while it was land situate within the manor. Upon the enfranchisement, therefore, of the alleged servient tenement it became freed from a burden which only existed upon it by virtue of the custom. Upon the above grounds I am of opinion that the appellant failed to establish any claim to the disputed way which could lawfully be made either by prescription or by custom or as of right.

I am further of opinion that the appeal fails upon the point upon which the judges in the Divisional Court differed in opinion. I agree with the view expressed by Lush J. as to the nature and effect of the deed of enfranchisement of September 28, 1897. As between the parties to that deed I entertain no doubt that the alleged right of way, if it ever existed, was extinguished owing to the fact that no reservation of it was made. Thesiger L.J. states the rule in the case of *Wheeldon* v. *Burrows* (1) thus: "The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." There may be cases such as *Thomas* v. *Owen* (2) where the Court, in order to preserve the existing right of some third party, has refused to apply this rule in its entirety. In the present case the only existing right, if any, in respect of the disputed way was that of the appellant's mother, who at the date of the deed of enfranchisement was the yearly tenant of the land to which, according to the findings of the county court judge, the right of way (if any) had by that time become annexed. In my opinion the facts in the present case, so far as it is possible to ascertain them, do not justify the contention that the Court must imply a reservation in the enfranchisement deed of the alleged right of way. There was not in the present case any formed road made over the alleged servient tenement to and for the apparent use of the dominant tenant, as there was in the case of *Thomas* v. *Owen*. (2) The use of the disputed way was, as far as it is possible to judge from the materials before the Court, in no sense necessary for the comfortable

(1) 12 Ch. D. 49. (2) 20 Q. B. D. 225.

enjoyment of the alleged dominant tenement, and having regard to these circumstances, and to the fact that the defendant's mother was a yearly tenant only, I do not consider this case one which can be taken out of the rule referred to by Thesiger L.J. to which I have already alluded.

There is, I think, this further difficulty in the appellant's way on this point. Even assuming that the Court should imply in the enfranchisement deed a reservation of the alleged right of way, it must, I think, be a reservation in favour of the then existing tenant only, and that the reservation would not be held to extend to a succeeding tenant, which the appellant was. Under these circumstances, no right of way, as claimed by the appellant, passed to him under the conveyance of May 7, 1914, of the alleged dominant tenement.

For these reasons the appeal, in my opinion, fails, and must be dismissed with costs.

SCRUTTON L.J. read the following judgment: This case raises a question of some difficulty as to which the Divisional Court differed in opinion. The defendant alleges that by eighty years' user by himself and his predecessors of a way over the plaintiff's premises he has acquired an easement or right of way appurtenant to his land. The plaintiff replies (1.) that as the defendant's land was demesne of the manor, and held by a yearly tenancy from the lord of the manor, and the plaintiff's land was copyhold of the manor, no easement could be acquired by prescription, as the reversion of both lands was in the same person; (2.) that if such an easement could be acquired, it was extinguished when the lord of the manor enfranchised the plaintiff's copyhold tenement without reserving the right of way. The county court judge decided in the plaintiff's favour on the first point. In the Divisional Court Lawrence J. was against the plaintiff on both points, but Lush J. was of opinion the plaintiff succeeded on the second point, even if he failed on the first point, on which he expressed no opinion.

The state of the title is as follows: The dominant tenement is demesne of the manor of Longdon, of which Lord Anglesey

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was lord of the manor. Since before 1848 down to 1888 the defendant's father was tenant from year to year from Lord Anglesey. In 1888 the father died, and the mother continued as tenant from year to year till 1912, when she died. The defendant then became tenant, and in 1914 bought the fee simple of the land from the Marquess, the minerals being reserved to the Marquess. For over eighty years there was such user by the defendant and his predecessors of a way over the plaintiff's land as would, but for the legal objections, if valid, have created a right of way over that land appurtenant to the defendant's land.

The history of the plaintiff's land was that during the early period it was copyhold of the manor of Longdon, of which Joseph Ingram "was seised according to the custom of the manor of Longdon for a customary estate of inheritance in possession." Ingram died in 1878, and his executors in 1879 sold the land to Thomas Bayley to hold the land according to the custom of the said manor. Bayley was admitted in 1880 and died in March, 1897. His executor Russell was admitted as a customary or copyhold tenant of the manor on September 27, 1897, to hold according to the custom of the manor. On September 28, 1897, Lord Anglesey enfranchised the premises, except as to the minerals, to hold freed and discharged from the copyhold tenure and all services in respect thereof. On September 29, 1897, Russell sold to the plaintiff the land which is recited to have been held by Ingram "in customary fee simple in possession," and conveyed it to him in fee simple. It is argued that this enfranchisement by the lord without reservation of the right of way, if any, to which he was entitled through the user of the Sanders family, the tenants of his demesne land, extinguished the right of way if it had ever existed. But it is also argued that it had never existed because the lord of the demesne could not prescribe against himself as lord of the copyhold. These interesting arguments left the parties at the time undisturbed and unmoved. The user which had existed before the deed of enfranchisement went on in exactly the same way for nearly twenty years after the deed;

and if it was a question what the parties really intended, I have no doubt they had not the slightest intention of changing the existing state of things except in so far as the copyhold tenure was abolished. But this does not settle the legal questions.

The first question is whether the right of way was ever acquired. The dominant tenement was demesne land of the manor, and the occupier, by a yearly tenancy, if he acquired any right of way, acquired it for his landlord, the owner in fee simple. It is established by decisions binding on this Court that one tenant cannot acquire an easement of way by prescription against another tenant holding of the same landlord: *Kilgour* v. *Gaddes*. (1) This has the result that in parts of the country where lands are let for 99 or even 999 years, no right of way can be acquired between two tenements where they have the same owner in fee simple. The question then is whether the lord of copyhold lands has the same relation to his copyhold tenant as a landlord has to his tenants for years, so that one copyhold tenant cannot prescribe for a right of way against another copyhold tenant or against his lord, because the ultimate interest in the dominant and servient tenement is in the same person. From very early times it has been the law that against strangers the copyholder cannot prescribe in his own name "for the weakness and baseness of his estate," but must prescribe in the name of his lord; and that therefore he cannot in strict language prescribe against his lord, for he would have to do so in his lord's name, "and the lord cannot prescribe to have common or other profit in his own soil." But the copyholder was always allowed to claim the right by the custom of the manor; and such a custom might be that the tenants of one tenement had by custom a right of common or other profit in one place: *Foiston* v. *Crachroode* (2); *Pearce* v. *Bacon* (3); 2 Blackstone's Commentaries, p. 265; and note 11 to *Potter* v. *North*. (4) In Scriven on Copyholds, 4th ed., p. 516, it is stated: "A copyholder as against

(1) [1904] 1 K. B. 457.
(2) (1587) 4 Co. 31b.
(3) (1595) Cro. Eliz. 390.
(4) 1 Wms. Saund. 349.

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all strangers must prescribe by custom through the lord, that is, that the lord and his ancestors, and all those whose estate he has, have had common in such a place for him and his tenants at will; but as against the lord he must prescribe by way of usage only." It appears from this that though the old rule about "prescribing in the que estate" prevented the copyholder from prescribing in the strict sense against another copyholder or his lord, he obtained the same right by the same evidence by claiming it by a custom of the manor as to the holding of that tenement. If the fact that both lands ultimately belonged to the same lord did not stop his doing this, I see no reason why the lord for his demesne land should not acquire a right of way over the servient tenement which it was bound to submit to by the custom of the manor of which it was held. I have not the experience which enables my brother Lawrence to state confidently that there are many easements in respect of one copyhold tenement over another, or in respect of the demesne lands over a copyhold, but I should be very much surprised, in view of the great extent of land held by copyhold tenure, if the statement is inaccurate. Indeed, in *Emson* v. *Williamson* (1) there is a case where a copyholder had from time immemorial a right of way over the land of another copyholder apparently, though it is not expressly stated, of the same manor, as otherwise the enfranchisement, as stated hereafter, would not have affected it. Again, in *Worledg* v. *Kingswel* (2), there is a case of "a copyhold of a manor which had common by prescription in sixty acres, parcel of the demesnes of the manor," the converse case of the present right of way in the lord in respect of his demesne over a copyhold tenement. There, however, I think it is clear the right would have been claimed as appurtenant to the tenement by the custom of the manor. The Court is always anxious to find a legal ground for long-continued enjoyment in fact, and here there appear to be legal grounds which have been regarded as sufficient from the time of Coke onwards. On the first point, therefore, I agree with

(1) 1 Rolle's Abr. 933.

(2) (1598) Cro. Eliz. 794.

Lawrence J. that the right of way existed at the date of the admittance of Russell in 1897. On this point Lush J. expressed no opinion.

The next question on which the learned judges below have differed is whether this customary right of way by which Russell's copyhold tenement was on September 27, 1897, bound in favour of part of the demesne lands of the lord, was extinguished when, on September 28, 1897, the lord enfranchised Russell's freehold at common law, and not under the Copyhold Act, 1894, without reserving that right. It is, I think, well established that where the owner of Blackacre, which in fact enjoys a way over Whiteacre, which he also owns, conveys Whiteacre to a stranger without reserving any right of way, no right of way remains appurtenant to Blackacre. As Thesiger L.J. said in *Wheeldon* v. *Burrows* (1): "If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." Thus in *Dell* v. *Babthorpe* (2) "J. S. had a close, and a wood adjoining to it, and time out of mind a way had been used over the close to the wood to carry and re-carry. He granted the close to one and the wood to another. The question was, 'If the grantee of the wood shall have the way'? And it was adjudged he should not; for the grantor by the grant of the close had excluded himself of the way, because it was not saved to him; and he himself could not use it, no more can his grantee." It would seem that this was not a way of necessity to the wood, as otherwise it would survive by implied reservation, as was the case in *Thomas* v. *Owen*. (3)

If this is the case where the owner of freehold lands makes a grant, what is the effect when a lord enfranchises copyhold lands which have rights by custom over other copyhold lands or the lord's demesne or the waste of the manor? If the enfranchisement had been under the Copyhold Acts, it is clear from s. 23 of the Act of 1894 that the lord's right of way over the tenement enfranchised would continue,

(1) 12 Ch. D. 31, 49.

(2) (1593) Cro. Eliz. 300. [The citation gives the whole substance of the report.]

(3) 20 Q. B. D. 225, 231.

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unless expressly destroyed by consent in writing. But in common law enfranchisements it seems clearly established that enfranchisement by the lord destroys these incidents of the enfranchised tenement which attached to the copyhold estate or depend on the custom of the manor, but not those which are attached to the land. As stated in Scriven on Copyholds, 4th ed., pp. 556, 557: "The right of common in the wastes of the lord of the manor is extinguished by enfranchisement . . . . and it has been adjudged, that common in the waste of the lord out of the manor is not lost by enfranchisement, for the copyholder hath it as belonging to his land, and not to his estate." See also Watkins on Copyholds, 3rd ed., vol. i., p. 565, and Elton on Copyholds, 2nd ed., p. 357. Mr. Elton also states the distinction to be between rights which belong to the estate of the copyholder, which are extinguished by enfranchisement, and rights which belong to the land, which are not so extinguished. A similar distinction would seem to apply to burdens on the land enfranchised as well as to rights; and, indeed, would more readily be inferred in such a case. If you have to prove the right or the burden by the custom of the manor the right or burden is gone when the tenement ceases to be held according to the custom of the manor. The distinction is expressed in the notes to *Potter* v. *North* (1) thus: "In strictness, when common, etc., is claimed within the manor on the lord's soil, it properly belongs to the estate; and if the copyholder enfranchise the copyhold, the common, etc., is lost. Indeed, where he claims it *out* of the manor, it belongs to the land, and not to the estate, and it is not lost by the enfranchisement of the copyhold." But when one asks whether a right of way or the burden of a way belongs to the land or to the estate, the answer seems doubtful. It is not made any clearer by the pleading decision in *Crouther* v. *Oldfeild* (2), where the plaintiff had claimed common in the waste of the manor as belonging to his land, and it was objected "that they ought not to claim common tanquam ad tenementa sua spectan. & pertinen., for it is annexed

(1) 1 Wms. Saund. 349a, n. 12. (2) (1704) 1 Salk. 364, 366.

to the estate, and not to the land. The reason is because the estate grew by custom, and so did the common as part thereof." To which, after verdict, the Court replied: "Where a copyholder claims common in the wastes of a manor, it properly and strictly belongs to the estate, and if he enfranchise his copyhold, in that case his common is lost; but where he claims it out of the manor, it belongs to the land, and not to the estate; and if he enfranchise the estate, the common continues. But all the precedents of common are tanquam ad tenementa sua spectan. . . . . And the Chief Justice (Holt C.J.) thought that, since the pleadings were so, the common might be said to belong to the copyhold tenement, since it belonged to the copyhold estate; for that which belongs to the estate belongs to the tenement."

But when so learned a real property lawyer as Kay J. had, in *Tilbury* v. *Silva* (1), to consider an argument of counsel that certain rights of way incident to rights of fishing were not extinguished by enfranchisement, he said: "The argument . . . . was this—that that kind of right would not necessarily be extinguished by the enfranchisement of the copyhold, because it would be like a right of way to the copyhold itself. It would be a thing attached, not to the estate of the copyholder, but to the land which he held." In that case the judge held the right extinguished, because it was clear that the right was claimed by custom of the manor explaining the copyhold tenure. If, therefore, it was shown that the right of way arose by custom of the manor, apparently the same result would have followed, and the judge must have been thinking of an express grant of right of way or of a way of necessity.

In *Emson* v. *Williamson* (2) also the whole report is: "If a copyholder of a manor has from time beyond living memory a way over the land of another copyholder, and purchases the freehold of his copyhold, by which the copyhold is extinct. Yet the way is not extinguished by this." Mr. Elton in his work (2nd ed., p. 357) explains this case by treating the other copyholder as a stranger—i.e., not in the same manor—for

(1) (1890) 45 Ch. D. 98, 110. (2) 1 Rolle's Abr. 933.

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otherwise the way must be not by prescription, but by the custom of the manor. But it is to be noticed that when this case was cited to the Court in *Barwick* v. *Matthews* (1), Heath J. said: "There is a distinction between a profit à prendre, as a common and a way, which is not such." He does not state, if both depend on the custom of the manor, what the distinction is, and I have been unable to find any reason for the distinction.

These are all the specific references I can find to rights of way over lands of the manor; but all the cases as to profits à prendre, especially as to rights of common, appear to treat such rights within the manor as extinguished by enfranchisement. In *Styant* v. *Staker* (2), where a lord enfranchised a copyhold, the grant giving all commons thereto belonging or appertaining, it was held to destroy the right of common at law, but to preserve it in equity, because of the intention shown by the words of the grant. But with no such words the right was gone. Thus in *Marsham* v. *Hunter* (3) a copyholder for life who had by custom of the manor common in the lord's waste was granted by the lord the freehold cum pertinentiis. It was held that the right of common was extinguished, "for he hath his common by reason of the custom, which annexeth the same to his customary estate; which being destroyed and determined by his own act, in making it a freehold, the common is also destroyed and determined, and cannot continue without special words." The same point was decided in the case of a customary right to estovers in *Fort* v. *Ward* (4), and in numerous other cases.

If I am right in the view expressed in the early part of this judgment, that a right of way by long usage between tenements part of a manor cannot be claimed by prescription, but must be claimed by custom of the manor, and if rights claimed by the custom of the manor are extinguished by enfranchisement unless expressly reserved or regranted, it will follow that the deed of enfranchisement in this case,

(1) 5 Taunt. 365, 376.

(2) (1691) 2 Vern. 250, as explained in Elton on Copyholds, 2nd ed., p. 269.

(3) (1609) Cro. Jac. 253.

(4) (1598) Moore, 667.

whether the parties intended it or not, extinguished the customary right of way. Lawrence J.'s opinion to the contrary, from which I differ with the greatest hesitation, does not expressly deal with the line of authorities to which I have referred, but takes the view that "the right of way was incident to the defendant's farm," and that the owner of the farm, who was also lord of the manor, by enfranchising the plaintiff's estate did not derogate from his grant if he claimed that the right of way existed. It is true that the plaintiff had in time before the enfranchisement an estate of inheritance, and the lord in effect was only releasing his rights as lord, but he was doing so by destroying the copyhold tenure and regranting a freehold tenure, and the destruction of the copyhold tenure, the authorities show, involved a destruction of the rights as of commons, and burdens as of heriots and escheats, and I think ways, depending on that copyhold tenure according to the custom of the manor. It was probably to avoid this result at common law that s. 23 of the Copyhold Act, 1894, was inserted as to the effect of statutory enfranchisements, but the effects of a common law enfranchisement, as in this case, remain unchanged. Reliance was placed by the appellant on *Thomas* v. *Owen* (1); but, apart from the numerous physical differences in the two ways in question—differences which in *Thomas* v. *Owen* (1) would easily lead to an implied reservation of the right of way—in my opinion that decision does not apply when the burden is placed on land by the custom of the manor and the land is freed of manorial custom by enfranchisement. If it loses its customary rights, as seems to be clear, it must, I think, also lose its customary burdens. I arrive at the same result as Lush J., but I think for somewhat different reasons. Like him, I regret the result, as it is unfortunate when nearly eighty years' enjoyment is defeated by legal rules which the parties did not know of, and a result is arrived at which the subsequent user shows the parties did not intend. But this frequently happens as the effect of our legal rules. Cases of merger are a striking instance; a merger generally

(1) 20 Q. B. D. 225.

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takes the parties by surprise. And while in this case I have tried to give effect to the long user by any means consistent with legal principles, I have found myself unable to do so. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Ward, Bowie & Co., for J. F. Addison & Cooper, Walsall.*

Solicitors for defendant: *Greene & Underhill, for Wilkinson & Co., Walsall.*

J. S. H.

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July 15, 16, 17, 18, 19, 22, 23, 24, 25, 29, 30; *Oct.* 15.

PRATT AND OTHERS *v.* BRITISH MEDICAL ASSOCIATION AND OTHERS.

[1915 P. 25.]

Action, Cause of—Interference with Practice of a Profession—Unlawful Means—Threats—Damage—Corporation—Malice—Restraint of Trade.

The defendants, the British Medical Association, a body incorporated under the Companies Acts for the purpose of maintaining "the honour and interests of the medical profession," and the other defendants, who were members of the Association, instituted and pursued a system of professional and social ostracism or boycott against the plaintiffs, who were medical men, by means of threats and widely extended coercive action. The defendants sought to justify the boycott on the ground that the conduct of the plaintiffs in acting as the medical officers of a certain medical dispensary was detrimental to the honour and interests of the profession. As a result of the boycott the plaintiffs suffered pecuniary loss in the exercise of their profession:—

Held, that the plaintiffs had a good cause of action against all the defendants for damages.

Held, also, that the rules of the Association, by means of which the boycott was enforced, were in restraint of trade and void as being against public policy.

A single person or a body of persons commits an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means, such as threats of coercive action, to injure that person's business, even though the unlawful means may not comprise any specific act which is per se actionable and actual malice is not proved. The element of conspiracy in a case of this kind is of importance only in considering the weight of the acts alleged and the extent of the damage resulting therefrom.

In an action for molesting a person in the exercise of his calling a corporation may, by its servants acting within the scope of their authority, be guilty of malice.

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ACTION tried by McCardie J. without a jury.

The plaintiffs were three medical men practising at Coventry and on the medical staff of an institution known as the Coventry Provident Dispensary. The defendants were the British Medical Association and four medical men who were members of the defendant Association, and who had at various times acted in an official capacity for the Coventry division of the Association. The plaintiffs claimed damages for conspiracy, slander and libel. In this report it is only necessary to deal with so much of the case as relates to the conspiracy.

The facts as found by the learned judge were in substance as follows :—

The Coventry Provident Dispensary was founded about 80 years ago for the purpose of securing medical attendance for its members and their families. In 1906 the members numbered about 20,000. Each member paid an annual subscription of 4*s*., and the total income was about 4000*l*. The income was expended upon the supply of drugs, the supply of skilled dispensers, and the management of the dispensary, and the balance, about 2000*l*., was divided among the doctors on the medical staff. Each of these doctors was also free to engage in private practice. In 1906 differences arose between the medical staff and the committee of management of the dispensary. The medical staff raised (inter alia) two contentions—first, that the absolute control over the whole affairs of the Dispensary ought to be entrusted to the medical staff instead of to the committee of management, of which the majority of the members were laymen ; and, secondly, with regard to the wage limit prescribed as a qualification for membership. The medical staff contended that members whose wages had, subsequently to their joining the Dispensary, increased to a substantial amount in excess of the prescribed limit, and who were therefore, it was said, able to pay the ordinary fees for private medical attendance, ought to cease to be members of the Dispensary. The committee did not accede to the wishes of the medical staff on either point, and in consequence the whole of their medical staff, including one of the defendants, resigned. The committee sought for other medical assistance.

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One of the plaintiffs, Dr. Burke, joined the medical staff of the Dispensary in 1907. His action in so doing was strongly resented by certain of the other medical practitioners in Coventry district, who disapproved of what was known as "contract practice," and from 1907 down to the date of the issue of the writ in this action a course of action was adopted by the British Medical Association and the other defendants with a view to procuring the professional and social ostracism of Dr. Burke. In the words of the learned judge the defendants subjected Dr. Burke to a "prolonged, deliberate and pitiless boycott." In order to make clear the nature of this boycott and the method by which it was rendered effective it is necessary to refer to the constitution of the British Medical Association and to certain of its rules.

The British Medical Association was incorporated in 1874 under the then Companies Acts. The memorandum stated the following as the primary object of the Association: "To promote the medical and allied sciences, and to maintain the honour and interests of the medical profession." The second article of association provided that any registered medical practitioner should be eligible for membership. The ninth article provided that a member might be expelled by the council of the Association on the ground that his conduct was detrimental to the honour and interests of the medical profession or the Association or calculated to bring the profession into disrepute, or on the ground that the member had wilfully and consistently refused to comply with the regulations of the Association or the rules of any division or branch of which he might be a member. The tenth article provided for due inquiry prior to expulsion, and further provided that no person should be capable of effectively resigning his membership when his conduct was under investigation. The eleventh article provided that the members of the Association should be formed into separate local bodies, styled divisions and branches. Each division had a local geographical area, and a branch consisted either of an important division or a group of divisions. The fourteenth article provided that every member whose address, as registered for the time being

in the books of the Association, was at a place situate within the area of any division should ipso facto be an ordinary member of that division and no other. The sixteenth article provided in substance that each division and each branch should be free to govern itself in such manner as it should think fit, and for that purpose to make from time to time such rules as it might think fit, and to repeal or alter the same as and when it should consider expedient. The rules so made were binding on the members constituting the division or branch after approval by council of the Association. It followed, therefore, that each division and branch was practically autonomous. Each division had various committees, for example, an ethical committee and an executive committee. The ultimate and supreme authority in the defendant Association was what was called the Representative Body, and this body possessed full power to enact such by-laws as it pleased. The general executive body was the council.

In 1903 Coventry had become an autonomous division pursuant to an order of the council under article 12. The majority of practitioners in the district happened to be members of the British Medical Association. The nearest and most important adjacent branch was Birmingham, but various other adjacent branches and divisions existed in the midland counties.

In 1904 the Association published what were called "model rules" for a division. They dealt with such matters as contract practice, appointments under existing contracts, unprofessional conduct of members, refusal of professional recognition and the like. Each division was free to adopt those rules or not as it wished. The Coventry division in November, 1904, adopted in substance all the model rules with slight variations. Rules F and G were as follows:—

Rule F: "No member of the division shall, except in circumstances of great urgency, meet in consultation, or hold any professional relations with a medical practitioner who shall have been declared by a resolution of the division, if a member, to have broken the rules of the division as to professional conduct, or, if not a member, to have acted (after

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due notice as herein provided) in contravention of the said rules or who, whether a member of the division or not, shall have been declared by the division to have been deemed guilty of conduct detrimental to the honour and interests of the profession or calculated to bring the profession into disrepute."

Rule G: "If in circumstances of great urgency a member of the division shall meet professionally a medical practitioner whom, under rule F, he could not meet except in such circumstances, he should at once report the fact with an explanation of the said circumstances to the secretary, who shall forthwith report the whole matter to the ethical committee of the division. If the ethical committee shall in any instance not be satisfied that the circumstances were of such urgency as to justify such action, it shall be the duty of the committee to inquire further into the matter and to report to the division whether, in the opinion of the committee, rule F has been broken by the member concerned."

The extension of the boycott scheme against the plaintiffs was effected by what was known as rule Z, which was promulgated as a model rule by the British Medical Association in 1906. It was adopted by the Coventry division in January, 1907. It was as follows: "(a) In every case in which the division shall, after due inquiry in accordance with the rules thereof, have passed a resolution declaring that in the opinion of the division the conduct of any medical practitioner or practitioners, whether by contravention of the rules of the division or otherwise, is detrimental to the honour and interests of the medical profession, it shall be the duty of the executive committee of the division to submit a report of the whole of the facts of each particular case to the central ethical committee of the Association, and subject to the approval of the committee, or, if the opinion of the said committee be adverse, subject to the approval of a three-fourths majority of those present and voting in a special meeting of the division convened to consider the comments of the ethical committee, to cause such resolution to be brought directly to the knowledge of every member of

the division by means of a notice in the following form, which notice it shall be the duty of the honorary secretary of the division to authenticate with this signature." The form was as follows: "British Medical Association. (Blank) Division. Private and Confidential. Notice. In pursuance of rule Z of the (blank) division, notice is hereby given by the executive committee of the said division that at a general meeting held on the (blank) day of (blank) a resolution in the following terms was duly passed: That, in the opinion of the division, the conduct of Doctor (blank) is detrimental to the honour and interests of the medical profession." "(b) In any case in which the division shall at the time of, or subsequently to, the adoption of a resolution of the nature contemplated by paragraph (a) of this rule have also resolved that in the opinion of the division it is desirable that such resolution shall be brought officially to the notice of any specified division or branch of the Association, it shall be the duty of the executive committee of the division to submit to the central ethical committee a statement of this fact and of the reasons for which such notification is desired and, subject to the approval of the said ethical committee, to cause a copy of the said resolution to be transmitted by the honorary secretary of the division or branch to the honorary secretary of the division or branch so specified."

The object of rule Z was to render the boycott effective, not only in the immediate division itself, but also in every neighbouring branch or division from which the condemned practitioner might desire any professional assistance or secure any professional recognition.

Each division and branch worked in close co-operation with the head authorities of the Association, and every action of the Coventry division and its officials was either instigated or fully sanctioned, and powerfully supported, by those authorities.

Dr. Burke became a registered medical man in 1895. He held from time to time various public appointments. His professional career was free from stigma. In May, 1907, he was appointed a medical officer to the Dispensary. Thereupon

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he received on May 26, 1907, from Dr. White, the chairman of the Coventry division, a letter indicating in clear terms the intended application of the boycott. Dr. Burke had become a member of the defendant Association in 1903, when he was practising at Wolverhampton. But in spite of Dr. White's letter he decided to take up his appointment, and accordingly in June, 1907, he came from another district to reside in Coventry with his wife and family, and began his duties as medical officer of the Dispensary. On June 20, 1907, the Coventry division passed a resolution condemning the conduct of Dr. Burke in accepting the post. On July 16, 1907, the Coventry division passed a resolution which declared in substance that Dr. Burke had violated the rules and resolutions of the division (of which he had automatically become a member in taking up residence in Coventry) by becoming a medical officer of the Dispensary. On July 20, 1907, this resolution was communicated to Dr. Burke, and he was invited to explain his position. The only "rules and resolutions" which Dr. Burke was alleged to have broken was a resolution of the Coventry division, passed on April 3, 1906, amounting in substance to a declaration that no member of the division should associate himself, or continue to be associated, with the Coventry Dispensary. On July 29, 1907, Dr. Burke replied that he was quite satisfied with his position, both professionally and socially. He was then warned by the chairman of the Coventry division that if he remained obstinate he would be expelled from the Association. The only charge against him was that he held the appointment of medical officer to the Coventry Dispensary. On August 28, 1907, the executive committee of the Coventry division unanimously decided to ostracise Dr. Burke "and to make the ostracism as complete as possible." On September 3, 1907, the Coventry division recommended the council of the Association to expel Dr. Burke on the ground that he had broken the rules and regulations of the division by holding the above post, and that this conduct was detrimental to the "honour and interests of the medical profession." On September 4, 1907, the Coventry division communicated this resolution to the Birmingham branch. On

December 18, 1907, the general secretary of the defendant Association cited Dr. Burke to appear before the central ethical committee to show cause against his proposed expulsion on the ground that he had accepted the post in question whereby (as was alleged) he had broken the rules of the Coventry division and had acted in a manner detrimental to the honour and interests of the medical profession. On February 13, 1908, he was expelled from the defendant Association upon the grounds just indicated. Thereupon the Coventry division at once consulted the head authorities as to the circulation of notices under rule Z. The Association duly supplied the necessary forms of notice to the Coventry division, and rule Z was put into effective operation, not only as to Coventry, but also with respect to Birmingham, Nuneaton, Tamworth, Leicester, Northampton, Nottingham, Leamington, and York. All the members of those branches and divisions were informed that the conduct of Dr. Burke in accepting the appointment of medical officer of the Coventry Dispensary was detrimental to the honour and interests of the medical profession, and the secretary and members of each branch and division were requested to take such steps as would ensure the effective support of each branch and division in the boycott of Dr. Burke.

In each of the above-named branches and divisions there existed the rules F and G and also rule Z, and the effect of these rules (togther with necessary resolutions passed by the branches and divisions in question) was to render it a breach of duty and a violation of the rules for any medical man in any of those branches or divisions (if a member of the British Medical Association) to meet Dr. Burke in consultation or to give him any professional recognition, except at the risk of being expelled from the Association on a charge of having acted against the honour and interests of the medical profession.

The result of the defendants' course of action was that Dr. Burke was, throughout the whole period of the boycott, unable to secure the services in consultation of a single medical practitioner (with one exception) in Coventry or the surrounding divisions. His private practice was, in consequence,

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greatly injured, and he and the members of his family were treated as social and professional outcasts.

The plaintiffs, Dr. Holmes and Dr. Pratt, joined the Dispensary medical staff in 1913. The boycott was applied to them in a similar manner and with similar results. Dr. Holmes was not a member of the Association.

The defendants asserted a legal right to employ the boycott to the utmost extent against the plaintiffs. The Association accepted responsibility for the acts of the various divisions and branches concerned in the boycott, and also for the acts of the officials and agents of those branches and divisions.

Schwabe K.C. and *Sir Hugh Fraser* for the plaintiffs.

McCall K.C., *Hollis Walker K.C.*, and *A. Neilson* for the defendants.

Cur. adv. vult.

Oct. 15, 1918. MCCARDIE J. delivered a written judgment, which, after stating the facts, continued as follows :—

I am satisfied that the notices circulated by the defendants in Coventry and the surrounding divisions were intended to, and did in fact, operate coercively. They were more than warnings. They were threats, and were meant to be threats. Behind them loomed the power of the defendant Association and the whole machinery of the boycott scheme. They were emphasized by the "black list" published each week by the defendants in the *British Medical Journal*. The Coventry boycott had, as was inevitable, become notorious, and the humiliation and loss inflicted on the Dispensary doctors was known to the medical world and to many of the public. The notices were meant so to disturb and intimidate the mind of each medical man who received them, or had notice of them, as to prevent him from exercising a free and voluntary action. They must be read in the light of the defendants' rules and actual methods and objects. How could any medical man, whether a consultant or not, who had become aware of the notices venture to meet any one of the plaintiffs? If he did so, then he himself would fall beneath the ban, and be subject to the boycott and professional ruin. This threat

of ruin was admittedly the very point and object of the defendants' scheme. It mattered not whether the medical man was a member of the British Medical Association or not. The doom was the same for all who should venture to meet a Coventry Dispensary doctor. I am satisfied that the rule Z notices were brought to the knowledge, directly and indirectly, of every medical man practising in Coventry and the surrounding divisions, which I have previously mentioned, whether members of the defendant Association or not. The publicity of the Coventry boycott, and the knowledge possessed by medical men of the procedure and rules of the defendant Association, are factors which cannot be disregarded. It was the very object of the defendants that every medical man in the divisions I have indicated should know the fate which awaited him if he met the plaintiffs. I think that they succeeded in their object.

The extent to which the defendants affected the minds of those who would otherwise have assisted the plaintiffs professionally is shown by the fact that although the members of the defendant Association constitute 50 per cent. only of the medical practitioners throughout the Midlands and the country generally, yet the plaintiffs were unable to secure the services of a single practitioner (with one exception) throughout the whole period of the boycott. The intimidation was general, effective and continuous; for if the practitioner was a member of the Association he stood in fear of both expulsion and ostracism. If he was not a member he yet stood in fear of the boycott and all the misery it involved. No professional man can risk the destruction of his professional repute. The degradations placed upon the plaintiffs were known to all, and the weapons wielded by the defendants were notorious and potent. It was the defendants' own case at the trial that the boycott had been effective to the utmost measure. The plaintiffs' submission at the trial was that the defendants have fallen within the law of actionable conspiracy. The defendants asserted that the boycott which they admittedly imposed, and the acts and threats involved therein, were within the limits of their legal rights. In

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support of this assertion Mr. McCall raised a number of important contentions, and with these I must deal in the course of this judgment.

The great importance of the case appears to call for a consideration of the law with respect to actionable conspiracy and the unlawful molestation of another in his business or calling. It is necessary, I think, in dealing with actionable conspiracy, to distinguish at once the line of decisions which have established that an action will lie against a man who unlawfully and knowingly procures a person to commit a breach of his contract with another whereby the latter suffers actual pecuniary damage. That conduct of this kind amounts to a well-recognized head of tort was settled in *Lumley* v. *Gye*. (1) This decision is now firmly rooted in our law. See per Lord Macnaghten in *Quinn* v. *Leathem* (2) and the *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3) The latter decision also shows with clearness that malice in the sense of spite or illwill is not an essential ingredient in this class of action. A cause of action may exist under the *Lumley* v. *Gye* (1) principle independently of any question of conspiracy. An individual can commit the tort as effectively as an aggregate of persons. The effect of a conspiracy to commit a wrong within *Lumley* v. *Gye* (1) is of importance only in considering the weight of the acts alleged and the extent of the resultant damage. Persuasion and inducement are more easily effected by many than by one, and the ensuing loss may be the greater. The observations I have just made with respect to the procurement of breach of contract apply in substance to any agreement between two or more to commit any other recognized kind of tort, such as trespass, libel, or assault. If the tort be committed, then all who have aided or counselled, directed or joined, in the commission are joint tort feasors. See per Tindal C.J. in *Petrie* v. *Lamont*. (4) The liability, however, of each is independent of the mere circumstance of combination. That circumstance is, I conceive, only relevant to the question of the agency

(1) (1853) 2 E. & B. 216.
(2) [1901] A. C. 495, 510.
(3) [1905] A. C. 239.
(4) (1841) Car. & M. 93, 96.

of one to bind the other by his acts, and to the point that greater damage may result where the wrongdoers are several or many. Conspiracy is not the gist of the matter.

When I use the words "actionable conspiracy" in this judgment I exclude, for the sake of clearness, an agreement between two or more to commit, followed by the actual commission of, any of the well-known species of tort such as those I have mentioned.

The existing law as to actionable conspiracy appears to have sprung from the duty and the power of the Courts to protect a man in the lawful exercise of his calling. The protection is necessarily limited, inasmuch as the right of a man to follow his vocation must be co-ordinated with the wide sphere of rights existing in his fellow-men. To reconcile the two sets of rights has ever proved a task of difficulty. In the great majority of recent cases the molestation of another in his calling has been effected by a combination of persons. The reason for this is obvious, for molestation by one may yield but slight result, unless obviously actionable weapons, such as defamation or personal assault, be employed; but molestation effected by a combination of many may achieve grave results, even though no specific part of the conduct employed amount in itself to actionable tort. See, for example, per Lord Lindley in *Quinn* v. *Leathem*. (1) This element of combination, exhibited in many cases and dwelt upon in so many of the dicta of distinguished judges, has, in my view, tended perhaps to obscure the true basis of the rules of law which render actionable an unlawful interference with a man's calling. It has almost been assumed occasionally that such interference must spring from a conspiracy before the law can give relief. The word "conspiracy" has been invoked as if it could convert that which is lawful, if done by one, into a cause of action if done by several in combination. But a juristic principle cannot rest on a mere appeal to the vocabulary of vituperation. Hence I must endeavour to ascertain the principles which were either discussed or which seemed to be involved in the leading case of *Quinn* v.

(1) [1901] A. C. 538, 540.

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Leathem (1), and to state with the utmost diffidence my views upon them. I realize fully the difficulties which face a judge of first instance in approaching this task and in discussing the weighty and somewhat varying dicta which are to be found in the relevant decisions.

The basic right of every citizen has been well stated by Sir William Erle in his famous work on Trade Unions, at p. 12, as follows: "Every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will." But that right is subject to the rights of others, and the limitations have been clearly stated not only in the continuation of the above passage in Sir William Erle's treatise, but also in the cogent judgment of Lord Lindley in *Quinn* v. *Leathem*. (2) He there says: "As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and

(1) [1901] A. C. 495. (2) [1901] A. C. 534, 535.

intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances." So far as I am aware this passage is fully consistent with all the authorities both before and after *Quinn* v. *Leathem*. (1) It states with cogency the right of every man to call upon others to refrain from unlawful interference with his calling, but it does not purport to define "unlawful interference." This serious question is dealt with elsewhere by Lord Lindley, and I will consider it later when I deal with the authorities, for I desire at present to point out that the passage I have cited from Lord Lindley's opinion indicates that the "unlawful interference" may be effected by a single person as distinguished from a combination of persons. I will assume for a moment that a defendant inflicts pecuniary damage upon a plaintiff by a threat of personal violence directed against one who wishes to become a customer of the plaintiff, but by reason of the threat abstains from dealing with him, whereby the loss contemplated by the defendant is imposed upon the plaintiff. In this illustration there would be no question of conspiracy or combination. But would not an action lie in such a case? The answer, I think, is clearly yes. So far as I am aware, there is no authority to the contrary. *Allen* v. *Flood* (2) decides only that it is not actionable for a single person merely to induce another not to enter into a contract with a third person, even though loss results to the third person from such inducement. In *Allen* v. *Flood* (2) there was no evidence whatever of intimidation or coercion or threat. This was made clear by the judgments of the majority in that case (see, for example, per Lord Macnaghten (3)), and still clearer by the opinions explanatory of that case pronounced by the House of Lords in *Quinn* v. *Leathem*. (1) I may mention that in

(1) [1901] A. C. 495. (2) [1898] A. C. 1.
(3) Ibid. 148.

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Allen v. *Flood* (1) there was no question of acts done by a combination of persons. I cite the following words of Lord Macnaghten (2): "In order to prevent any possible misconstruction of the language I have used I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the elements of oppressive combination. The vice of that form of terrorism commonly known by the name of 'boycotting,' and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case conspicuously absent."

Not only is there no authority against the view I have expressed as to the existence of a cause of action upon the illustration I gave, but there is weighty authority in its favour. The point was clearly put by Romer L.J. in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (3) when he said: "But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its objects the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship, as to make that person liable in an action. And I think that this view is

(1) [1898] A. C. 1. (2) [1898] A. C. 153.
(3) [1903] 2 K. B. 600, 619, 620.

borne out by the views expressed by the members of the House of Lords who decided the case of *Quinn* v. *Leathem*. (1)" Romer L.J.'s view seems amply justified when I turn to another passage in the opinion delivered by Lord Lindley in *Quinn* v. *Leathem*. (2) He there says: "One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action." The opinion of Lord Lindley in *Quinn's Case* (1) is apparently supported by the judgment of Lord Watson (one of the majority) in *Allen* v. *Flood*. (3) I need not now read the passage. The opinions already cited seem to be agreeable to the other cases which were cited in *Allen* v. *Flood* (4) and *Quinn* v. *Leathem*. (1) I may mention two. Thus in *Tarleton* v. *M'Gawley* (5) it was held that an action lay against the master of a ship for intentionally firing a cannon at negroes off the coast of Africa, and thereby preventing them from trading with the plaintiffs. This decision was clearly approved by all the members of the House of Lords in *Allen* v. *Flood* (4), and was equally approved in *Quinn* v. *Leathem*. (1) So, too, in *Garret* v. *Taylor* (6) it had been previously held that an action would lie against a defendant who by threats of corporal hurt and of vexatious litigation prevented customers from dealing with, and workmen from labouring for, the plaintiff. This decision was accepted as sound law by all the members of the House of Lords both in *Allen* v. *Flood* (4) and *Quinn* v. *Leathem*. (1) I need not further refer to the older decisions, the majority of which are cited in the judgments of the judges and of the members of the House of Lords in *Allen* v. *Flood*. (4) Their accordance with the ancient principles of the common law is well indicated by Sir Frederick Pollock in his luminous work on the Law of Torts, 10th ed., pp. 244 and 246. It is curious that the weighty judgments in *Quinn* v. *Leathem* (1) dwelt with such amplitude upon the points of conspiracy

(1) [1901] A. C. 495.
(2) [1901] A. C. 537.
(3) [1898] A. C. 97.
(4) [1898] A. C. 1.
(5) (1794) 1 Peake, N. P. C. 270.
(6) (1620) Cro. Jac. 567.

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and combination. The element of conspiracy seems to have been a merely incidental feature of that case. It was not, I conceive, the gist of the matter. The true principle of the common law had, I think, already been indicated in *Garret* v. *Taylor* (1) and *Tarleton* v. *M'Gawley* (2), and the incident of conspiracy seems to add nothing of direct juristic relevance to that principle.

In my opinion the rule of law is reasonably clear that a single person, or a body of persons, will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business, even though the unlawful means may not comprise any specific act which is per se actionable.

The rule just stated at once invites, and indeed requires, a consideration of the meaning of the words " unlawful means." In view of the infinite variations of oppressive misconduct no definition can be given which is at once satisfactory and exhaustive. Just as " fraud " cannot be fully defined, so " unlawful means " is insusceptible of exhaustive definition. But the existing decisions indicate certain acts and conduct which fall within the phrase. Other manifestations of conduct may in future days be also held to fall within it. Personal violence against a third person in order to injure a plaintiff—see *Tarleton* v. *M'Gawley* (2); or threats of personal violence—see *Garret* v. *Taylor* (1) and *Keeble* v. *Hickeringill* (3), per Holt C.J.; or nuisance—see *Lyons* v. *Wilkins* (4); or fraud—see *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (5), per Buckley L.J. and Kennedy L.J.; or threats, even though they do not amount to threats of personal violence—see *Quinn* v. *Leathem* (6); are recognized heads of unlawful means. This last head of the illustrations I have given as to unlawful means is the one which calls for attention in this case. Upon a sufficiently wide definition of the word " threats " depends to a vital extent the efficacy

(1) (1620) Cro. Jac. 567.
(2) 1 Peake, N. P. C. 270.
(3) (1706) 11 East, 574n.
(4) [1899] 1 Ch. 255.
(5) [1908] 1 Ch. 335, 360, 368.
(6) (1901) A. C. 495.

of the law which safeguards a man from unlawful molestation in his trade. In *Quinn* v. *Leathem* (1) the only threat established against the defendants was a threat to a customer of the plaintiffs that the servants of that customer would be instructed to cease work if the customer continued to deal with the plaintiff. There was no threat of actual personal violence, but a coercive notification to the customer that pecuniary loss would arise to him if he did not act on the intimation. See, too, the facts and the decision in *Giblan's Case* (2), and the opinion of the House of Lords in the important case of *Conway* v. *Wade*. (3) I can draw no distinction between a threat to cause a strike and a threat to inflict upon a man the slur of professional dishonour. Each may produce intimidation. I am bound by authority to recognize the distinction between a warning and a threat. The distinction may indeed sometimes be subtle; but it exists. It was recognized by the majority of the Law Lords in *Allen* v. *Flood*. (4) It was conceded by Lord Loreburn in *Conway* v. *Wade*. (5) It formed the basis of the decision of the Court of Appeal in *Santen* v. *Busnach*. (6) In every case, therefore, I must take it to be a question of fact whether or not the words used amount to a threat or constitute a mere warning. The answer to the question must depend on the general circumstances of the case. I desire most respectfully to cite the words of Vaughan Williams L.J. in *Santen's Case* (6), when he said that a man may give a notice against the wording of which nothing can be said, but in such a manner, and under such circumstances, as to constitute a threat. See, too, per Lord James of Hereford in *Conway* v. *Wade*. (7)

In the present case I can entertain no doubt that the defendants made their boycott of the plaintiffs effective not by warnings only but by the employment of actual threats. The medium by which a threat is conveyed can vary. It may be by spoken words or by writing, or by general conduct, or by all three. Coercion is effected in many ways.

(1) [1901] A. C. 495.
(2) [1903] 2 K. B. 600.
(3) [1909] A. C. 506.
(4) [1898] A. C. 1.
(5) [1909] A. C. 510.
(6) (1913) 29 Times L. R. 214.
(7) [1909] A. C. 514.

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The whole circumstances must be considered in each case. It is perhaps useful to call attention to the varying phrases employed in many of the well-known judgments with respect to threats and the like unlawful means. In the *Mogul Case* (1) Bowen L.J. refers to "fraud," "intimidation, molestation or obstruction." Fry L.J. says (2): "I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction or moral intimidation." In the same case, when before the House of Lords, the following words were used by Lord Halsbury (3): "Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful." Lord Watson (4) referred to "either misrepresentation or compulsion." Lord Bramwell said (5): "The plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs." Lord Field (6) referred to "violence or threats." In *Allen* v. *Flood* (7) many like expressions were used by the judges and the members of the House of Lords. I merely refer to Lord Herschell when he spoke of "violence, menaces of violence, false statements," and to Lords Macnaghten and Davey, who alike refer to "intimidation or coercion." (8) In *Conway* v. *Wade* (9) Lord Loreburn refers to "violence or threats"; Lord James of Hereford refers to "threatening language"; Lord Shaw refers to "language of a threatening, coercive character," and to the case of "coercive interference." In *Larkin* v. *Long* (10) Lord Atkinson refers to "the wilful and malicious infringement in combination of that legal right of personal freedom of action"; in the same case Lord Sumner refers

(1) (1889) 23 Q. B. D. 598, 615.
(2) Ibid. 626.
(3) [1892] A. C. 25, 37.
(4) Ibid. 43.
(5) Ibid. 44.
(6) Ibid. 52.
(7) [1898] A. C. 1,
(8) Ibid. 137, 145, 171.
(9) [1909] A. C. 510, 514, 520.
(10) [1915] A. C. 814, 830, 838.

to "coercion." It is with respect to the question, inter alia, of coercion as a result of threats that the element of combination or conspiracy may assume importance. This aspect of the matter (which I have previously indicated) was forcibly put by Lord Macnaghten in *Quinn* v. *Leathem* (1), where he said: "A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong." The point was also made by Lord Lindley in the same case (2), when he said: "Numbers may annoy and coerce when one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce." Again he says: "In considering whether coercion has been applied or not, numbers cannot be disregarded." The above citations will indicate the wide measure of protection which the law seeks to confer upon a man whilst in the lawful pursuit of his calling. I feel I should not omit to quote the following words of Lord Lindley in *Quinn's Case* (3): "A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is prima facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification."

These words of Lord Lindley will lead me to consider the question of "the justification" or "just cause" which may save a defendant from liability, although he has committed acts which are, prima facie, actionable under the rule of

(1) [1901] A. C. 511. (2) Ibid. 538, 540.
(3) Ibid. 538.

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law I have stated. But, before doing so, it may be convenient to mention and distinguish several authorities which are connected with the question of actionable conspiracy. I take them in order. First, the *Mogul Case*. (1) I shall not detail the well-known facts of this case. It will suffice to say that the decision in that case rested upon the footing that there was no element whatever of threat, intimidation, or coercion. This is clear from every judgment delivered in the House of Lords, and was emphatically pointed out by Lord Halsbury in *Allen* v. *Flood* (2), and by Lord Brampton in *Quinn* v. *Leathem*. (3) So, too, in *Kearney* v. *Lloyd* (4), there was no element whatever of coercion. The defendants, moreover, in that case, although they agreed with each other to abstain from contributing to the plaintiff's sustentation fund, did not even combine to coerce other parishioners not to contribute. See the observations of Lord Lindley on *Kearney* v. *Lloyd* (4) in *Quinn* v. *Leathem*. (5) In *Huttley* v. *Simmons* (6), a case tried before Darling J. with the aid of a jury, it did not appear that any threat of coercion was established. Had that element been proved I most respectfully venture to think that the decision of Darling J. would have been otherwise. See the comments on that case by Lord Lindley in *Quinn* v. *Leathem*. (5) In *Sweeney* v. *Coote* (7) there was again no evidence of coercion. As Lord Robertson put it: "I see no evidence whatever of any pressure or inducement, or any interference with the choice, liberty, or will of any given person." As to the Scotch case, *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (8), I need only say two things. First, that it illustrates the difficulty of this branch of law with which I am dealing; and, secondly, that the sound explanation of that case seems to be that given by Lord Lindley in *Quinn* v. *Leathem*. (9) The Scotch case appears to rest on the same footing as the *Mogul Case* (1) already quoted.

(1) [1892] A. C. 25.
(2) [1898] A. C. 76.
(3) [1901] A. C. 527.
(4) (1890) 26 L. R. Ir. 268.
(5) [1901] A. C. 540.
(6) [1898] 1 K. B. 181.
(7) [1907] A. C. 221, 224.
(8) (1898) 35 Sc. L. R. 645.
(9) [1901] A. C. 539.

I now deal with the question of "just cause." The defendants in the present case asserted that they exercised their coercive acts with the legitimate object of advancing their professional interests, and that, therefore, they were freed from liability. This is a point of vital importance. The question of "just cause" has arisen in connection with cases within the *Lumley* v. *Gye* (1) rule; that is to say, when the defendant has knowingly induced a breach of contract between a plaintiff and a third person. All the decisions in which *Lumley* v. *Gye* (1) has been considered appear to recognize that "just cause" may be pleaded by a defendant. See, for example, per Lord Macnaghten in *Quinn* v. *Leathem*. (2) There is constant recurrence of that phrase in many judgments, but no clear opinion has been expressed as to the facts or circumstances which will constitute "just cause." See the observations of Sir Frederick Pollock in his Treatise on Torts, 10th ed., p. 345. In the *Glamorgan Case* (3), when in the Court of Appeal, Romer and Stirling L.JJ. declined to attempt a definition of the phrase, "sufficient justification." A father, I assume, can interfere to prevent his daughter from marrying a man of criminal character. See per Stirling L.J. (4) in the same case. This, indeed, would be the fulfilment of a clear duty. So, too, a defendant who held a prior contract with a third person inconsistent with the plaintiff's contract with that person may, I assume, be justified in inducing a breach of the latter contract. See per Buckley L.J. in *Smithies* v. *National Association of Operative Plasterers*. (5) But whatever may be the difficulty of definition, it is settled that certain facts will not amount to "just cause" for inducing a breach of contract. The matter was strongly put by Darling J. in *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (6): "No one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that

(1) 2 E. & B. 216.
(2) [1901] A. C. 510.
(3) [1903] 2 K. B. 545, 573.
(4) Ibid. 577.
(5) [1909] 1 K. B. 310, 337.
(6) [1902] 2 K. B. 88, 96, 97.

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he acted as an altruist, seeking only the good of another and careless of his own advantage." These words received the full concurrence of Channell J. in the Divisional Court, and they are, I think, in substance approved by the judgment of Collins M.R. in the same case on appeal. (1) See, too, *Smithies' Case.* (2) The soundness of the view expressed by Darling J., as already cited, was shown by the decision of the House of Lords in the *Glamorgan Coal Case.* (3) There the South Wales Miners' Federation was held liable in damages for procuring a breach of contract by certain miners, although the Federation acted honestly, and without malice or illwill, towards the employers, and with the object only of keeping up the price of coal by which the wages were regulated. It is clearly settled, therefore, in cases within *Lumley* v. *Gye* (4), first, that malice in the sense of spite or illwill is not an ingredient of the action; and secondly, that no justification exists by reason of the fact that the defendants acted either for the advancement of their own trade interests or for the advancement of the interests of those with whom they were associated.

If this, then, be the rule when the facts are within *Lumley* v. *Gye* (4), can any different rule exist where the defendant has caused injury to another's trade by the employment of unlawful means such as threats, intimidation, or violence, although no breach of actual contract has thereby been caused? To this question I conceive the answer is clearly, no. Honesty or disinterestedness of motive cannot justify the employment of illegal means. That "just cause" may exist even in cases within *Quinn* v. *Leathem* (5) appears to be suggested by several of the opinions in that case. It will suffice to refer to the words of Lord Brampton (6) and to the words of Lord Lindley. (6) But I respectfully confess my inability to discover any head of justification which will sanction the employment of violence or of threats. How can mere self-interest be such a justification? So to hold

(1) [1902] 2 K. B. 732, 737.
(2) [1909] 1 K. B. 310.
(3) [1905] A. C. 239.
(4) 2 E. & B. 216.
(5) [1901] A. C. 495.
(6) Ibid. 520, 538.

would appear to negative the line of decisions ranging from *Garret* v. *Taylor* (1) in 1620, to *Quinn* v. *Leathem* (2) in 1901. If Lord Shand, in *Quinn* v. *Leathem* (3), meant to indicate a view contrary to that I have just suggested, I must venture, with most profound respect, to express my doubt. It is inconsistent with the dicta of other judges to which I hereafter refer. In *Tarleton* v. *M'Gawley* (4) the object of the defendant was the advancement of his own trade interests, for he had expressed his intention not to permit trade with the plaintiffs until a debt due from the plaintiffs to himself was satisfied. I may also take the illustration given by Holt C.J. in *Keeble* v. *Hickeringill* (5) of a schoolmaster who by threats of violence prevents the passage of scholars to the rival school of the plaintiff. How could self-interest afford an answer in such a case? In *Lyons* v. *Wilkins* (6) the injunction was granted, although the object of the defendants was clearly to advance the interests of their trade union. In *Quinn* v. *Leathem* (2) the defendants were subject to heavy damages, although the substantial object of the defendants was the advancement of their trade interests. I observe that Lord Macnaghten says (7): "But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union." I respectfully point out, however, that there was no finding of the jury to that effect, and I venture to refer to the view expressed by Lord Lindley (8) when he said "that they" (the defendants) "acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them." Then he proceeds to refer to the conduct of the defendants, and says: "What is the legal justification or excuse for such conduct? None is alleged, and none can be found." In the *National Phonograph Case* (9) it was the clear view of Buckley

(1) Cro. Jac. 567.
(2) [1901] A. C. 495.
(3) Ibid. 514.
(4) 1 Peake, N. P. C. 270.
(5) 11 East, 574n.
(6) [1899] 1 Ch. 255.
(7) [1901] A. C. 511.
(8) Ibid. 536, 537.
(9) [1908] 1 Ch. 360, 371.

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and Kennedy L.JJ. that the defendants were not excused in their employment of illegal means by the fact that they acted with the object of advancing their own trade interests rather than for the purpose of gratifying an illwill towards the plaintiffs. Finally, in *Larkin* v. *Long* (1), Lord Atkinson uttered the following words, in which Lord Haldane, then Lord Chancellor, concurred: "The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence to an action for the breach of any contract they have entered into,—*Read* v. *Friendly Society of Operative Stonemasons* (2)—and still less is it a defence to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are." In view of the above citations, and as a matter moreover of legal principle, I conceive that the employment of illegal means for the purpose of injuring another's trade or calling, is not excused by proof on the part of a defendant that his conduct was based on the intention to advance the trade interests either of himself or his colleagues.

It may be convenient to consider here the position of the present defendants, and particularly of the defendant Association, in connection with their contention of "just cause," before I deal with the further questions which arise as to malice, and as to the liability of a corporation for the malicious acts of its agents. The defendant Association was, as I have previously said, a body of persons incorporated in 1874 under the Companies Acts. They possess no special statutory rights. They hold no charter from the Crown. They are merely a company with limited liability. The following, as already stated, is the first object given in their memorandum of association: "To promote the medical and allied sciences and to maintain the honour and interests of the medical profession." The succeeding objects stated in the memorandum need not be set out, save the last, which is as follows: "To do all such other lawful things as may

(1) [1915] A. C. 830.

(2) [1902] 2 K. B. 88, 732.

be incidental or conducive to the promotion or carrying out of the foregoing objects or any of them." Upon the words "to maintain the honour and interests of the medical profession" has been erected a powerful scheme and machinery throughout and beyond the United Kingdom. I have indicated its substance in the earlier part of this judgment. The coercive force of the defendant Association rests primarily upon what are called the ethical rules, of which rule Z and rules F and G, or their equivalent, are the relevant examples. These rules have behind them, not merely the local bodies, but the weight and power of the British Medical Association. It is clear, and it is admitted, that the aim of the defendants is to inflict professional ruin upon any medical man who breaks a rule of the local body or any rule which may be made by the head body itself. This grave power is used not only against members of the defendant Association but also against those who have never belonged to it. The weapons of condemnation and punishment are employed against both. It follows that the defendants claim to enforce, by boycott and by the infliction of ruin, their own standard of medical honour and interest throughout the country. This point is momentous; it touches the vital interests of every medical man. He may be exposed to degradation and dishonour at the will of a body which is void of the slightest statutory sanction in that behalf. The character of the medical profession is clearly of the greatest importance. Hence Parliament deemed it well to enact the Medical Act of 1858 (21 & 22 Vict. c. 90). A medical council was created with statutory powers. They maintain the medical register. A doctor whose name is erased from that register is denuded of all professional status. Sect. 29 of that Act is as follows: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall, after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the Register." This

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power of erasure is a grave one. The doom of a medical man may be pronounced by the Council if they think that infamous conduct is proved. Hence the Legislature has enacted that the General Council shall be a weighty and widely representative body of responsible men, including five persons nominated by the Crown, upon the advice of the Privy Council. The powers of this body must be exercised after due inquiry and after adequate notice to the person charged. The great powers of the Council, and the limitations thereof, have been indicated by the Court of Appeal in the three well-known cases of *Allbutt* v. *General Medical Council* (1); *Leeson* v. *General Medical Council* (2); and *Allinson* v. *General Medical Council*. (3) There must be evidence on which the Council could fairly act, and there must be absolute bona fides on their part. See *Leeson's Case* (2) and *Allinson's Case*. (3) The phrase "infamous conduct" is one which has called for consideration, and in *Allinson's Case* (3) the following formula was framed by the Court of Appeal: "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful and dishonourable by his professional brethren of good repute and competency, then it is open to the Council to say that he has been guilty of 'infamous conduct in a professional respect.'" The breadth of this formula is somewhat striking, and I respectfully think that it is desirable to attach full weight to the word "reasonably" therein. If this word receive full effect, then the formula may provide a good working rule for the General Medical Council. A statutory body thus exists to safeguard the honour of the medical profession.

But the British Medical Association has taken to itself a jurisdiction more far-reaching, and perhaps more potent, than that of the General Medical Council. It entrusts to a large extent the standard of "the honour and interests" of the medical profession to a number of scattered bodies throughout the country, which vary in numbers, inclination,

(1) (1889) 23 Q. B. D. 400. (2) (1889) 43 Ch. D. 366.
(3) [1894] 1 Q. B. 750, 760.

views and self-interest. A branch or division may make a rule to suit its own local pecuniary interest. If that rule be broken by a medical man, be he a member of the defendant Association or not, then he becomes subject to a declaration that he has acted against the honour and interests of the medical profession. Upon this declaration there follows a local condemnation, and upon this local condemnation there may result a merciless boycott and resultant ruin of the person against whom it is directed. The position created by the defendant Association is well shown by the following brief extract from the cross-examination of Dr. Cox (the secretary and chief witness of the Association): "(Q.) In your view, is there a different standard of ethics in relation to holding appointments in different parts of England? (A.) Yes. (Q.) So that in one part of England it would be contrary to the honour of the profession to hold the appointment, and in another part it would not? (A.) Yes, as judged by the only way we know how to judge it, by the opinion of the medical men of the neighbourhood. (Q.) Do you think that is an answer? (A.) I do. (Q.) I will take your answer. Judging it in the only way you are able to judge it, there are different standards of ethics in different parts of the country? (A.) Yes." I give this extract from the evidence of Dr. Cox not only because it is a neat summary of the position, but also because he was a witness of great ability and wide experience. I need scarcely point out the grave consequences which follow. A fixed standard for the profession as a whole is destroyed. The words "medical honour" become a phrase of a varying and wholly uncertain significance. Each of the three plaintiffs have been free from professional stain, I think, in the minds of any ordinary and just-minded man. The following appears in the cross-examination of Dr. Cox: "(Q.) Are the plaintiffs perfectly honourable members, so far as you know, of their profession? (A.) I know nothing against them except their taking this appointment. (Q.) That means this. If Coventry adopts these rules, then to take or hold such an appointment at Coventry is contrary to the honour and interests of the

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profession? (A.) Yes, that is so. (Q.) And the man who does it is to be ostracised? (A.) Yes, that is so. (Q.) Whereas, if it is not a rule, he is not? (A.) Yes."

It will be remembered that neither Dr. Burke nor Dr. Pratt had been a party to making the Coventry rules, and that Dr. Holmes was not even a member of the defendant Association, yet each was condemned and boycotted in the same way and for the same reasons. That the defendants realized the grave nature of a declaration that a doctor has been guilty of conduct detrimental to the honour of his profession is clear again from the evidence of Dr. Cox: "(Q.) Do you consider it a serious thing to say about a medical man that he has done something detrimental to the honour of his profession? (A.) I do. (Q.) Very serious? (A.) I do." Now, what had the plaintiffs in fact done? They had merely accepted posts as the medical officers of a highly respectable and well-managed dispensary upon terms which gave them ample remuneration, adequate leisure, and a full opportunity of private practice, and a right to claim and exert all the honourable requirements of professional men. Their only fault lay in the fact that their acceptance of the posts prevented the local medical men from achieving their wish either to capture or to destroy the Coventry Dispensary. The alleged sin was financial rather than moral in its character. This was frankly admitted by several of the defendants' witnesses. The pecuniary interests of the Coventry doctors lay at the root of the matter. The question of ethics, as that word is ordinarily understood, had nothing to do with the case. The plaintiffs were punished because they defeated the intended overthrow of the Coventry Dispensary. If the Coventry Dispensary had been destroyed as a lay organization, then the local doctors could obviously have taken such steps as would have increased their area of private practice, and their emoluments would have gained a corresponding expansion. This was the fundamental object of the defendants. The non-participation in such aim by the plaintiffs was the head and front of their offending. I may point out here that there is no rule of the profession

as to the fees which an ordinary medical practitioner may charge. They may be very high or very low. They vary infinitely. They depend on locality, competition, the status of the patient, the wishes of the doctor, and the particular circumstances of the case. They may be paid at such times, and in such instalments, as may be agreed and either as specific charges for attendance or by way of salary or inclusive sum. There is no rule or etiquette whatever on the matter which binds the ordinary medical man. The General Medical Council has established no standard on the point, nor had it indicated any requirement whatever as to the duty of a practitioner with respect to remuneration. The assertion that the plaintiffs had been guilty of conduct against the "honour" of the profession cannot, in my view, be supported. The honour of the profession is amply protected, I think, by the wide powers entrusted by Parliament to the General Medical Council. I personally cannot view with favour the assumption by the British Medical Association of a co-ordinate jurisdiction and the enforcement of varying views of medical honour with the deliberately framed weapons of ostracism, intimidation and threat. The results of that assumption are indicated with painful clearness in the present case, and the sufferings which the plaintiffs have undergone are not, I think, explained, or mitigated, by the phrase quoted by Sir John Tweedie (a witness for the defence): "It is the lot of minorities to suffer." The British Medical Association may exercise a great and beneficent influence in moulding medical opinion. It may exert the powers of persuasion. It may wield the weapon of moderate argument. If its views be sound they will doubtless be followed in due time by the profession. But the Association will surely gain nothing in the end by the methods of oppression or the utterance of threats. In my view the plaintiffs were boycotted, punished and pecuniarily damaged without just cause in law, and I deem it my duty to say upon the facts proved before me, that the plaintiffs did not sin against the "honour" of the medical profession, within any fair meaning of that significant word.

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I may point out that the defendants had a full opportunity of raising as a definite defence to the claim for defamation that the plaintiffs had in fact been guilty of conduct detrimental to the "honour and interests of the profession." Yet they omitted to place any contention of that kind on the record. The plea of justification to the claim for defamation is absent. I several times pointed this out in the course of the trial, but the defendants did not ask for any amendment in that respect.

The observations which I have made upon the defendants' rules have not hitherto referred to the question of their validity. But having regard to the singular severity of the boycotting rules and of the restrictions which they involve on the freedom of medical men, it is perhaps desirable that I should briefly deal with this point which was raised by Mr. Schwabe. The guiding authority on the broad principles to be considered is still the *Nordenfelt Case.* (1) The public interests must be regarded conjointly with the interests of individuals when restraint of trade is in question. Recent illustrative decisions will be found in *Neville* v. *Dominion of Canada News Co.* (2) and *Horwood* v. *Millar's Timber and Trading Co.* (3) The doctrine of "restraint of trade" has been applied in many directions. The restraint may exist in a contract between two parties, or in rules purporting to bind many individuals. See, for example, *Hilton* v. *Eckersley* (4); *Hornby* v. *Close* (5); *Old* v. *Robson* (6); and *Cullen* v. *Elwin.* (7) Many decisions were considered in the well-known case of *Russell* v. *Amalgamated Society of Carpenters and Joiners.* (8) Upon considering the rules in question I have arrived at the conclusion that they are in restraint of trade, and are void on the ground of public policy. They gravely, and in my view unnecessarily, interfere with the freedom of medical men in the pursuit of their calling, and they are, I think, injurious to the interests of the community at large. It may well be that the opinion I have just expressed

(1) [1894] A. C. 535.
(2) [1915] 3 K. B. 556.
(3) [1917] 1 K. B. 305.
(4) (1855) 6 E. & B. 47.
(5) (1867) L. R. 2 Q. B. 153.
(6) (1890) 62 L. T. 282.
(7) (1904) 90 L. T. 840.
(8) [1912] A. C. 421.

will, if upheld, destroy the cogency of the defendants' scheme of boycott; but it leaves them with the safer and more kindly weapons of legitimate persuasion and reasoned argument.

I now consider the question of malice, which has caused me deep anxiety. Two points at once arise. The first is: What is malice? and secondly, is malice essential to a cause of action based on the pecuniary injury inflicted by the employment of unlawful means to molest a man in his trade?

I take the questions separately. What is malice? It is desirable, I think, at once to exclude that meaning of the word which indicates a merely conventional phrase of lawyers. It is common in libel cases, even where no question of privilege can possibly arise, to allege that the defendant published the defamatory matter maliciously. The word in such a case as that adds nothing to the allegation of publication. It is a formal assertion only. The case of *Reg.* v. *Munslow* (1) illustrates the superfluous use of the word "malicious" in many cases, whether the pleading be civil or criminal. Lord Bramwell spoke aptly when in *Abrath* v. *North Eastern Ry. Co.* (2) he referred to "that unfortunate word 'malice.'" For the purposes of the present case, therefore, I exclude the purely formal significance (whatever that may be) of the word "malice." But there yet remains the meaning of the word when it is used to indicate the actual state of mind of a defendant when he commits an alleged tort. It is a matter of regret that a full explanation of the meaning of the word "malice," when employed in other than a formal sense, is not to be found. Perhaps the word is incapable of complete definition. There appear, however, to be at least two distinct heads of actual malice when that word is used to indicate a state of mind in such actions as defamation or malicious prosecution. The first head is indicated by the words "spite or illwill." This head is well understood by juries, and the proof of a prior insult to, and the resultant vindictive feeling of, a defendant frequently disposes of the plea of privilege. Lord Macnaghten was perhaps alluding to this aspect of the words when in *Quinn* v. *Leathem* (3)

(1) [1895] 1 Q. B. 758. (2) (1886) 11 App. Cas. 247, 253.
(3) [1901] A. C. 511.

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he said: "The defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants, who were not members of the union."

But the second head is equally important. "Malice" in the actual sense may exist, even though there be no spite or desire for vengeance in the ordinary sense. The jurist has enlarged the layman's notion of malice. This is observable both in defamation and in malicious prosecution. In the defamation cases the dicta and decisions are broad in their scope. Thus in *Dickson* v. *Earl of Wilton* (1) Lord Campbell said: "Any indirect motive, other than a sense of duty, is what the law calls 'malice.'" In *Turnbull* v. *Bird* (2) Erle C.J. said: "Malice means any corrupt motive, any wrong motive, or any departure from duty." In *Browne* v. *Dunn* (3) Lord Herschell said: "Malice means making use of the occasion for some indirect purpose." "Unreasoning prejudice" may, as shown by the *Royal Aquarium Case* (4), justify a jury in a finding of malice. In *Stuart* v. *Bell* (5) the point was stated by Lindley L.J. as follows: "Malice, in fact, is not confined to personal spite and illwill, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett L.J., every wrong feeling in a man's mind: *Clark* v. *Molyneux*." (6) Upon passing from the defamation cases to malicious prosecution I find that a useful illustration of the above dicta is to be found in *Mitchell* v. *Jenkins*. (7) That decision shows that a prosecution may be malicious, in the full sense, if it be instigated by a motive which the law does not approve; as, for example, the extortion of money. If that motive exists, then the defendant may be liable, although he honestly believed in the guilt of the person accused.

Is, then, actual malice, as indicated by the dicta and decisions I have cited, an essential ingredient in the present cause of action for molestation? In my opinion the answer

(1) (1859) 1 F. & F. 419, 427.
(2) (1861) 2 F. & F. 508, 524.
(3) (1893) 6 R. 67, 72.
(4) [1892] 1 Q. B. 431.
(5) [1891] 2 Q. B. 341, 351.
(6) (1877) 3 Q. B. D. 237, 247.
(7) (1833) 5 B. & Ad. 588.

is, no. The word "maliciously" has been employed often in many of the cases cited in this judgment, but I feel that it obscures the gist of the action. If the plaintiff proves his pecuniary damage, and also proves that illegal means such as violence or threats have been used, he has established I think, all that the law requires. What would it have availed the defendant to prove in *Tarleton* v. *M'Gawley* (1) that he did not act maliciously? So, too, may the same question be asked with respect to *Garret* v. *Taylor* (2); *Lyons* v. *Wilkins* (3); *Giblan's Case* (4); and *National Phonagraph Case.* (5)

I deem it, therefore, reasonably clear from those and the other relevant decisions referred to in this judgment that the absence of actual malice does not justify the employment of unlawful means to injure a man in his calling. I abstain from considering the effect of actual malice in a case where no illegal means at all have in fact been employed, but where the acts causing injury to the plaintiff have been carried out by a combination of persons in pursuit of no other object than to maliciously injure him. This point was left open in the *Mogul Case* (6) and also in *Allen* v. *Flood.* (7) A careful consideration of *Bradford Corporation* v. *Pickles* (8) might suggest that the point had actually been settled by that case. But the question, which is a grave one, seems to be still left for judicial determination, as appears from the observations delivered by Lord Macnaghten and Lord Shand in *Quinn* v. *Leathem.* (9) It may be, however, that, contrary to my own view, actual malice will be held by an appellate tribunal to be essential to the maintenance of this cause of action now under consideration. Hence I am unable to avoid the most distasteful and painful duty of deciding whether or not such malice has here been proved against the defendants. I profoundly regret that I am without the assistance of a jury on the point. I must myself, therefore,

(1) 1 Peake, N. P. C. 270.
(2) Cro. Jac. 567.
(3) [1899] 1 Ch. 255.
(4) [1903] 2 K. B. 600.
(5) [1908] 1 Ch. 335.
(6) [1892] A. C. 25.
(7) [1898] A. C. 1.
(8) [1895] A. C. 587.
(9) [1901] A. C. 510, 512.

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fulfil the task which I deeply wish could have been discharged by another body. I will assume for the moment that a corporation may be liable for the malice of its agents acting within the scope of their authority. In considering whether the defendants have been guilty of actual malice I do not forget that the motives, feelings and objects of the defendants were mixed. Their conduct was doubtless instigated to a large extent by the desire to protect the local pecuniary interests of Coventry doctors and the general interests of the profession. But, on the other hand, it is unhappily clear that the defendants were angrily hostile to the plaintiffs, and unceasingly bitter in their feelings towards them, that they sought every opportunity of inflicting humiliation, and that they admittedly wished to render the lives of the plaintiffs and their families unbearable.

I am further satisfied that the defendants desired to achieve far more than the mere protection of their interests. They desired to punish the plaintiffs as a separate end in itself, and they meant to make that punishment bitter to the last degree. This, in my opinion, was in any event unjustifiable. Upon the question of punishment I extract the following question and answer from the evidence of Dr. Cox: "(Q.) Was one of the objects of the ostracism to punish these doctors? (A.) Undoubtedly." It is admitted, moreover, that the defendants desired not only to punish but to ruin the plaintiffs. The complete professional ruin of the Dispensary doctors was the essence and aim of the boycott scheme, and of the steps taken by the defendants. This aim, in my opinion, was a wrong motive or purpose, and constituted an unjustifiable intention to inflict injury. I must regard the whole history of the case, and the total body of facts, incidents, documents, and the evidence given before me. I do not feel called upon to pursue a psychological inquiry as to the precise or varying meanings of the words "motive," "purpose," "intention," "object," or the words "indirect," "wrong," or "unjustifiable." I must act as a fair-minded jury would act.

In my opinion there is, as a matter of law, evidence on which a jury could properly find that the defendants acted

with actual malice. As a judge of fact, I feel compelled, with the deepest reluctance and with abiding distress, to come to the conclusion upon the whole material before me, that the plaintiffs have established actual malice against all the defendants. I may incidentally add that, had it been necessary to decide the point, I should hold that where persons are acting in combination to achieve such a purpose as that which is shown in the present case, then the proved malice of one or more may be attributed to the other participants in the combination. See the rule established in cases of defamation by *Thomas* v. *Bradbury, Agnew & Co.* (1) and *Smith* v. *Streatfeild*. (2)

I must now consider briefly the contention raised by Mr. McCall—namely, that actual malice cannot, as a matter of law, be attributed to the defendant corporation. He cited *Manchester Corporation* v. *Williams* (3) in support of his submission. There, the statement of claim alleged that the defendants had charged the plaintiff corporation with corrupt practices. It was held by Day and Lawrance JJ. that inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action. But, in my view, that decision has no relevance to the facts of the present case. It is, therefore, unnecessary to consider whether it be consistent with the *South Hetton Case*. (4) The plaintiffs here seek to make the defendants liable upon the ordinary principle that a man is responsible for the acts of a servant when done within the scope of that servant's employment. The defendant Association admits that the acts of their agents here fell within that scope, and the contention of Mr. McCall amounts in substance to a plea that the malice of a servant or agent cannot in law be attributed to his master. But the rule of law is now well established that a master, whether a corporation or not, may be liable for the actual malice of his servant, for malice, as a state of mind, rests on the same juristic footing as any other state

(1) [1906] 2 K. B. 627.
(2) [1913] 3 K. B. 764.
(3) [1891] 1 Q. B. 94.
(4) [1894] 1 Q. B. 133.

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of mind, and a servant's state of mind may, in appropriate cases, be attributed to his principal.

In 1854 it was apparently thought that an action for malicious prosecution would not lie against a corporation aggregate. See *Stevens* v. *Midland Counties Ry. Co.* (1) So, too, it was doubted whether the malice of a servant could, in an action of libel, be attributed to a corporate defendant. See *Whitfield* v. *South Eastern Railway Co.* (2) But the old doubts have passed away, and the case of *Barwick* v. *English Joint Stock Bank* (3) established a principle, the soundness of which has been fully recognized and the logical consequences whereof have now been completely established. In *Edwards* v. *Midland Railway Co.* (4) Fry J. held that an action of malicious prosecution would lie against a corporation. In *Bank of New South Wales* v. *Owston* (5) Mr. Benjamin K.C. for the appellant bank expressly abandoned the point that the action would not lie against a corporation, whilst in *Cornford* v. *Carlton Bank* (6) the very able counsel then appearing for the defendants (with the assent of Lord Russell of Killowen C.J., and A. L. Smith and Vaughan Williams L.JJ.) conceded that an action for malicious prosecution would in law lie against a corporation aggregate. The basis of *Barwick* v. *English Joint Stock Bank* (3) was pointed out by Lord Selborne in *Houldsworth* v. *City of Glasgow Bank.* (7) The principle is one which is independent of the particular head of torts. It is a principle of the law of agency, and the express decision of Fry J. in *Edwards* v. *Midland Ry. Co.* (4) seems to accord fully with the views of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (8) As with malicious prosecution so with libel. For it is now clear that in such an action a corporation may be held responsible for the actual malice of a servant acting within the scope of his employment. See *Citizens' Life Assurance Co.* v. *Brown.* (9) The decision in *Glasgow Corporation* v.

(1) (1854) 10 Ex. 352.
(2) (1858) E. B. & E. 115, 121.
(3) (1867) L. R. 2 Ex. 259.
(4) (1880) 6 Q. B. D. 287.
(5) (1879) 4 App. Cas. 270.
(6) [1900] 1 Q. B. 22.
(7) (1880) 5 App. Cas. 317, 326.
(8) [1912] A. C. 716.
(9) [1904] A. C. 423.

Lorimer (1) rested on the footing that the agent in that case was acting beyond the sphere of his employment. I should like to express my appreciation of the clearness and the force of the note appearing at p. 64 of the 6th ed. of Clerk & Lindsell on Torts upon the point I have just dealt with. I agree with the view there indicated that "actual malice" can be attributed to a corporate body, not only with respect to defamation and malicious prosecution, but with respect also to any other head of tort of which actual malice may constitute an ingredient.

It follows from what I have said that in my view the plaintiffs have established a cause of action against the defendants, and each of them, for unlawfully molesting the plaintiffs in their profession. I must, therefore, consider the question of damages. Each defendant has been associated with the wrong done to the plaintiffs from the commencement of the period of actionability—that is, six years from the issue of the writ on January 6, 1915. I am, therefore, relieved from the question of severance of damage which arose upon particular circumstances in *O'Keeffe* v. *Walsh*. (2) Inasmuch as the circumstances here do not permit of severance of damages, it follows that each defendant is responsible for the full amounts I am about to award the plaintiffs. The defendants are joint tort feasors, and thereby jointly liable. See *Dawson* v. *M'Clelland* (3); *Damiens* v. *Modern Society* (4); *Greenlands* v. *Wilmshurst* (5); *Smith* v. *Streatfeild* (6); and *Thomas* v. *Moore*. (7)

The amount of damages is at large. In the course of the proceedings it was expressly and necessarily conceded that the defendants, as they intended to do, had inflicted actual and substantial pecuniary damage upon each of the plaintiffs. But the plaintiffs are not limited to actual pecuniary damages suffered by them. The Court or jury, once actual financial loss be proved, may award a sum appropriate to the whole circumstances of the tortious wrong inflicted. See *Exchange*

(1) [1911] A. C. 209.
(2) [1903] 2 I. R. 681.
(3) [1899] 2 I. R. 486.
(4) (1910) 27 Times L. R. 164.
(5) [1913] 3 K. B. 507; [1916] 2 A. C. 15.
(6) [1913] 3 K. B. 764, 769.
(7) [1918] 1 K. B. 555.

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Telegraph Co. v. *Gregory* (1); *Allen* v. *Flood* (2); *Quinn* v. *Leathem* (3); and *Larkin* v. *Long*. (4) What damages, then, should I award? With respect to Dr. Burke, I must remember, inter alia, the operation of the Statute of Limitations. With respect to Dr. Pratt, moreover, I must remember, amongst other points, that he does not claim damages for his actual expulsion from membership of the defendant Association. I have weighed carefully all the circumstances of the case. I cannot ignore the deliberate and relentless vigour with which the defendants sought to achieve the infliction of complete ruin. I must regard not merely the pecuniary loss sustained by the plaintiffs, but the long period for which they respectively suffered humiliation and menace. I have arrived at the conclusion that it is my duty to award the following damages upon the conspiracy claim: to Dr. Burke the sum of 1000*l.*; to Dr. Holmes the sum of 700*l.*; to Dr. Pratt the sum of 700*l.*

[The learned judge then dealt with the questions of libel and slander, and awarded damages to the plaintiffs in respect of those claims.]

Judgment for plaintiffs.

Solicitors for plaintiffs: *S. B. Cohen, Dunn & Co.*
Solicitors for defendants: *Hempsons.*

(1) [1896] 1 Q. B. 147, 153
(2) [1898] A. C. 79.
(3) [1901] A. C. 495.
(4) [1915] A. C. 814.

F. O. R.

[IN THE COURT OF APPEAL.]

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LONDON COUNTY COUNCIL, APPELLANTS *v.* METROPOLITAN RAILWAY COMPANY, RESPONDENTS.

Metropolis—General Line of Buildings—Certificate of Superintending Architect—Order of Tribunal of Appeal—Jurisdiction—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 24, 25, 29, 183.

The superintending architect of metropolitan buildings was required under s. 22 of the London Building Act, 1894, to define the general line of buildings in that part of a street in which a building was in course of erection. The superintending architect by his certificate defined the general line of buildings in that part of the street by a line drawn between two points. The owners of several buildings affected by the line so drawn appealed to the tribunal of appeal under s. 25 of the Act. The tribunal of appeal divided that part of the street dealt with by the certificate of the architect into three sections, A to C, C to D, and D to E. The building in reference to which the application to define the line was made was situate in that part of the street covered by the section C to D. The tribunal of appeal confirmed the certificate as to the section C to D, and, reversing the certificate as to the sections A to C and D to E, decided that there was no general line of buildings between A and C, and defined a different general line of buildings between D and E. Upon a case stated as to the jurisdiction of the tribunal of appeal to deal with the general line of buildings between A and C:—

Held, that, as the tribunal of appeal had decided that the "part of the street" in which the building, in reference to which the jurisdiction of the superintending architect was invoked, was situate ended at the points C and D, they had no jurisdiction to deal with the general line of buildings between A and C, and therefore had no jurisdiction to decide that there was no general line of buildings in that section.

APPEAL from the judgment of a Divisional Court upon a case stated by the tribunal of appeal under the London Building Act, 1894.

In August, 1909, one Bousfield was in course of erecting a building on the site of Nos. 378, 380, 382, and 384, Euston Road, and on August 27 the appellants required the superintending architect of metropolitan buildings to define the general line of buildings on the northern side of Euston Road so far as related to the said building. On September 28, 1909, the superintending architect made a certificate under s. 22

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of the London Building Act, 1894 (1), in which he certified that the general line of buildings on the northern side of Euston Road between Hampstead Road and Osnaburgh Street was as defined by a red line on the plan thereto annexed, and he further certified (under s. 29 of the Act) in effect that the building in course of erection (coloured blue on the plan) was situate in that part of Euston Road. The red line was drawn about 50 feet back from the edge of the pavement. The respondents were the owners of Nos. 408 to 432 (even numbers only) in the part of Euston Road affected by the certificate, and on October 13, 1909, they gave notice of their intention to appeal to the tribunal of appeal.

Other owners of plots affected by the certificate also gave

(1) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22: (1.) "No building or structure shall without the consent in writing of the Council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor."

Sect. 24: "The superintending architect shall within fourteen days after the issue of the certificate defining the general line of buildings in any street or part of a street place or row of houses cause a notice of his certificate to be served on the local authority and on the owner of the building or land to which the certificate relates and on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates or where there is no such block or row upon the owner of the adjoining land on either side of the building or land to which the certificate relates. . . . ."

Sect. 25: "The local authority or any person deeming himself aggrieved by the certificate of the superintending architect may appeal to the tribunal of appeal."

Sect. 183: "The tribunal of appeal shall subject to the provisions of this Act have jurisdiction and power to hear and determine appeals referred to them under this Act." The tribunal of appeal were given power to hear the council and the parties interested and to hear evidence "and to confirm or reverse or vary any decision and make any such order as they may think fit. . . . ."

Sect. 184: "The tribunal of appeal may from time to time subject to the approval of the Lord Chancellor make regulations . . . . as to the procedure to be followed in cases of appeal to the tribunal . . . ."

notice of appeal. (1) The contention of the appellants was that the general line of buildings in the part of the Euston Road dealt with by the certificate was the inner edge of the pavement. The appeals were heard together, and on December 17, 1909, the tribunal of appeal, after hearing evidence and viewing the premises, delivered a written judgment, and on January 17, 1910, the order of the tribunal in writing under their seal was issued. The tribunal divided the distance from Osnaburgh Street to Hampstead Road into three sections, which on a plan annexed to the judgment they lettered (proceeding from west to east) A to C, C to D, and D to E. The building in course of erection by Bousfield was situated in the section C to D. The respondents' plot was situate in the section A to C. The tribunal of appeal confirmed the certificate of the superintending architect so far as it related to the general line of buildings defined by him between C and D, and reversed the certificate as to the two other sections. The order (so far as material) was as follows :— "We do hereby allow the said appeal of the Metropolitan Railway Company and reverse the said certificate of the superintending architect . . . . so far as it relates to the general line of buildings defined by him between the limits A and C on the plan hereto annexed, and we decide and determine that as between the said limits there is no general line of buildings. Further, we do hereby dismiss the said several appeals (naming them) and we confirm the said certificate of the superintending architect . . . . so far as it relates to the general line of buildings defined by him between the limits C and D on the plan hereto annexed and shown by a strong red line. Further we do hereby reverse the said certificate of the superintending architect . . . . so far as it relates to the general line of buildings defined by him between the limits D and E," and they defined the general line of buildings in that section by a green line.

The tribunal also in their written judgment stated that, as

(1) One of these cases was taken to the House of Lords: *London County Council* v. *Clode* [1915] A. C. 947. The history of the Euston Road is given in the report of that case.

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to two houses between the point A and a point marked B on the plan annexed to the judgment, they found as a fact that these two buildings, each marked with a circle on the plan, were not situated in Euston Road but fronted into Osnaburgh Street. In the plan annexed to the order of the tribunal of appeal the two circles were omitted, and no reference was made in the order as to the street in which the two houses were situate, it being, as the case stated, unnecessary to determine in what street they were situate inasmuch as the tribunal had decided that between A and C there was no general line of buildings.

After the tribunal had delivered their judgment counsel for the London County Council stated that there might be a question as to the jurisdiction of the tribunal to deal with the general line of buildings between A and C, although the superintending architect had defined the line up to Osnaburgh Street, and the Council reserved any right to dispute the jurisdiction of the tribunal to deal with the general line of buildings between A and C.

The case stated that the appeals required a consideration by the tribunal of the whole of the general line of buildings between Hampstead Road and Osnaburgh Street certified and defined by the architect's certificate, and evidence was given in respect of the whole of the general line of buildings as certified, and that no objection was taken to their jurisdiction during the hearing of the appeals.

On February 24, 1916, the Council applied to the tribunal to state a case for the opinion of the Court, but the application was refused. An order was made for the statement of a case and on May 3, 1917, the parties appeared before the tribunal, and after requesting the tribunal to state certain additional facts to those above mentioned (1), stated their contentions as follows (2) :—

(1) These additional facts are in substance set out in *London County Council* v. *Clode* [1915] A. C. 952, 953. It is not considered necessary to re-state them for the purposes of this report.

(2) These contentions, the case stated, were not raised at the hearing before the tribunal of appeal, but were contentions proposed to be raised before the High Court.

The appellants contended:—(1.) That it was not open to the tribunal of appeal after they had confirmed the architect's certificate so far as it related to the portion of the Euston Road between C and D, which included the premises in respect of which the architect was requested to define the general line of buildings, to go on to define or deal with the general line of buildings between A and C. (2.) That the tribunal were wrong in law in finding that there was no general line of buildings in the part A to C. (3.) That as there was no appeal before the tribunal under s. 29 of the London Building Act, 1894, as to the two buildings west of B they were not entitled to determine in what street or streets such buildings were situate, and were wrong in law in determining that the buildings were not situate in the Euston Road.

The respondents contended that between A and C the general line of buildings disappeared when the buildings which formed such general line were pulled down, and that therefore there was now no general line of buildings between A and C.

With regard to contention (1.), the tribunal said that they did not define the general line of buildings between A and C except in so far as their decision that there was no general line was a defining of a general line, and if and so far as their decision was a defining of the general line of buildings between A and C they said that, the architect having defined the general line of buildings between A and E and such general line being the subject of the appeals, they heard such appeals, and gave their decision accordingly.

With regard to contention (2.), the tribunal said that having regard to the powers conferred upon them by s. 183 of the Act they considered that if they came to the conclusion, as they did, that there was no general line of buildings they ought so to decide.

With regard to contention (3.), the tribunal said that they found the facts in their judgment, but that they did not by their order, for the reasons already given, determine in what street or streets the buildings were situate or that the buildings were not in the Euston Road.

The questions for the Court were:—

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(1.) Whether in these proceedings the tribunal of appeal were entitled to define the general line of buildings between the points A to C on the plan?

(2.) Whether they were right in determining that there was no general line of buildings between the points A to C on the plan?

(3.) Whether they were entitled to determine in what street or streets the buildings to the west of point B were situate or to determine that the buildings were not in the Euston Road?

The Divisional Court were divided in opinion, Atkin J. being of opinion that the appeal should be allowed, while Shearman J. was of opinion that the order of the tribunal should be maintained.

The appellants appealed.

Upjohn K.C. and *Craig Henderson* for the appellants. On the true construction of s. 22 of the London Building Act, 1894, the superintending architect and the tribunal of appeal have jurisdiction to determine the general line of buildings for that part of the street in which the proposed building is situate and for no other part. They have no jurisdiction to determine the general line either to the east or the west of that part of the street. They may look to the east or west for evidence upon which to act (*London County Council* v. *Galsworthy* (1)); but evidence is one thing, determination is another. The tribunal of appeal have only jurisdiction to do what the superintending architect had power to do under s. 22—namely, to define the general line of buildings with reference to a proposed building or structure. They have done that by drawing the line between C and D. Having decided that that was the "part of the street" in which the building proposed to be erected was situated, and having defined the general line of buildings for that part, they had exhausted their powers. They had no jurisdiction to deal with any other part. It cannot be contended that the superintending architect by taking too long a line and therefore exceeding his jurisdiction can enlarge the jurisdiction of the tribunal of appeal. The architect states

(1) [1918] A. C. 851.

that the proposed building is in the part of the street between Osnaburgh Street and Hampstead Road. In truth, as the tribunal of appeal have found, it was situate in the part between the points marked C and D, and he ought to have laid down the general line of buildings for that portion only. No question was raised before him as to the portion west of that, and he had no jurisdiction to deal with it. Consequently the tribunal of appeal had no jurisdiction to determine either that there was no general line of buildings at the western end of the street or to say what houses were in Osnaburgh Street and what in Euston Road.

[*Lord Auckland* v. *Westminster Board of Works* (1); *London County Council* v. *Pryor* (2); *Lilley* v. *London County Council* (3); and *London County Council* v. *Clode* (4) were also referred to.]

Macmorran, K.C. and *Bethune* for the respondents. The duty of the superintending architect is, not to fix a new general line of buildings, but merely to prescribe what the building line is in fact: *London County Council* v. *Clode*. (5) If there are no buildings he may say that there is no general line of buildings. The superintending architect decided that the part of the street in which the proposed building was situated ran from A to E, and fixed the general line of buildings for that part. The tribunal of appeal had jurisdiction under s. 183 of the London Building Act, 1894, to deal with the whole line laid down by the superintending architect, and to confirm, reverse, or vary his decision as to that. They had jurisdiction to deal with the decision of the superintending architect. They had therefore jurisdiction to deal with the section from A to C, and to say that there was no building line there. *London County Council* v. *Galsworthy* (6) is in favour of this view. There was ample evidence upon which they could so find. They saw the place. The decision of the tribunal that there was no building line between A and C is merely a reason for reversing the decision of the architect as to that section. It does not follow

(1) (1872) L. R. 7 Ch. 597.
(2) [1896] 1 Q. B. 465.
(3) [1910] A. C. 1.
(4) [1915] A. C. 947.
(5) Ibid, 959.
(6) [1918] A. C. 851.

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that buildings can be erected up to the edge of the street. Sect. 22 prohibits that.

[*Lord Auckland* v. *Westminster Board of Works* (1) was also referred to.]

As to the two houses which the tribunal of appeal say in their judgment are in Osnaburgh Street and not in Euston Road, this finding is not embodied in the order as drawn up, and therefore is not binding: Rule 8 of the regulations made in 1895 by the tribunal of appeal under s. 184 of the Act (now rule 13 of the regulations of 1914 in substantially the same terms).

Upjohn K.C. was not called upon to reply.

BANKES L.J. In my opinion the judgment of Atkin J. is right. On August 27, 1909, the London County Council called upon the superintending architect to define the general line of buildings in relation to some premises in Euston Road, marked blue on the plan, and on September 28 the superintending architect gave his certificate laying down the general line of buildings from Osnaburgh Street to Hampstead Road. There were a number of appeals to the tribunal of appeal, and the latter body on January 17, 1910, made the order complained of. The order divided that part of Euston Road which had been dealt with by the superintending architect as one whole into three sections—namely, as marked on the plan, A to C at Osnaburgh Street end, C to D in the middle, and D to E at Hampstead Road end. The tribunal of appeal affirmed the superintending architect's decision as to the middle section C to D, and no question arises as to it. The question before us is as to the section A to C, and the complaint is that the tribunal of appeal, having come to the conclusion that the general line of buildings as laid down by the superintending architect ended at C, had no jurisdiction either to lay down another general line of buildings as to the part of the street between A and C, or to say that there was no general line of buildings applicable to that section.

The superintending architect is set in motion and derives

(1) (1872) L. R. 7 Ch. 597.

his jurisdiction in reference to some particular building or structure. This is clear from the language of s. 22 of the London Building Act, 1894, which provides that "no building or structure shall, without the consent in writing of the Council, be erected beyond the general line of buildings in any street or part of a street, place, or row of houses, in which the same is situate," and "such general line of buildings"—that is, the line in the street or part of the street in which the particular building or structure is situate—"shall if required, be defined by the superintending architect." Therefore the architect is set in motion and derives his jurisdiction in reference to some building or structure, and his duty is to define the general line of buildings to which the particular building or structure is to conform. The general line may be a long or a short line; it may be a straight or undulating or curved line; the determination of that matter will depend upon the state of the buildings in the immediate neighbourhood of the particular building or structure in reference to which the architect has been set in motion. The position in this respect is described by Lord Herschell L.C. in *Barlow* v. *Vestry of St. Mary Abbotts.* (1) "In that case (2) it was manifestly considered by their Lordships, and I think rightly, that a building may be situate in a row of houses and bound to conform to the general building line of such row of houses, though that is not the general building line of the street, and further, that the general building line may differ in different parts of the same street, and that it is for the superintending architect to determine 'the extent of the space along which a line is to be laid down' (3) in deciding what is the general line of buildings at any part of the street." It is therefore for the superintending architect to fix the points at which the general line of buildings which he lays down as applicable to the particular building or structure begins and ends. Difficult questions may arise as to where the line does or ought to end. Such a question was raised in argument in *London County Council* v. *Galsworthy* (4), but the House

(1) (1886) 11 App. Cas. 257, 263.
(2) *Spackman* v. *Plumstead Board of Works* (1885) 10 App. Cas. 229.
(3) Ibid. 243.
(4) [1918] A. C. 851.

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of Lords carefully refrained from giving any opinion on the particular facts there as to how far the line laid down in regard to buildings and structures lying between the two named points was binding as to houses and structures which lay beyond those limits. This case is free from that difficulty, because the tribunal of appeal have decided that the general line of buildings ends at the point C. Wherever the line is duly determined to end, there the jurisdiction either of the superintending architect or of the tribunal of appeal must also end, because it is a decision in terms that the general line of buildings which the architect or the tribunal had jurisdiction to determine in reference to the particular building or structure ends there, and from that point there may be another and a different line. In order to give jurisdiction to the architect or the tribunal to deal with that other and different general line of buildings the occasion must arise which gives jurisdiction under s. 22 of the London Building Act, 1894, and it will only arise when some building or structure is being dealt with in such a way as to bring about an application for the fixing of a general line of buildings in respect of that building or structure.

It is said that the tribunal of appeal merely reversed the superintending architect in reference to the section A to C. If they had merely done that no complaint could have been made, but the complaint is that they went on to determine that as between A and C there was no general line of buildings. As between the parties interested in the section A to C the effect is the same in one respect as if they had decided that the general line of buildings stopped at C and that another line of buildings in the section A to C was applicable, because whether the determination takes the one form or the other the matter is res judicata, and the party who desires to complain of the decision cannot do so. In my opinion, the tribunal of appeal, having come to the conclusion that the general line of buildings in reference to the particular building or structure stopped at C, had no jurisdiction to determine anything with regard to the general line of buildings in the section A to C, whether they say that there is no general line of buildings or

whether they lay down another and a fresh line of buildings. The tribunal of appeal exceeded their jurisdiction in this respect.

Having come to that conclusion it is not necessary to deal with the other points raised, but I will state my opinion upon them. It is said that the particular point which the tribunal decided as to the section between A and C was never properly raised before them or discussed, and that no indication was given to the parties that the tribunal proposed to decide it. Possibly the notice of appeal technically would have entitled the parties, if they had been so minded, to raise the point, but that is not material. It is clear that this point was never in anyone's mind; it was a point which the tribunal took and decided without any intimation to the parties or any opportunity given to them to deal with it. The decision so come to cannot stand.

The next point is that there was no evidence to support the finding of the tribunal in reference to the section A to C. I express no opinion upon this point, because if the matter had been properly before them their jurisdiction is one which allows them to act upon their own personal observation and view of the premises, and we have no knowledge as to what they saw or whether what they saw was sufficient to enable them to come to a decision if the parties had been warned of it and had been enabled to deal with it.

The last point has reference to the two buildings west of the point B. It is clear that the tribunal in their judgment purported to deal with this question, but in the order as drawn up under the seal of the tribunal no reference is made to this point. By rule 8 (now rule 13) of the regulations made by the tribunal under s. 184 "the decision of the tribunal shall be embodied in an order in writing under the seal of the tribunal." It follows that, as this point is not embodied in the order, the judgment on it is of no binding effect. As a question is asked upon it in the special case the answer is twofold: first, the tribunal had no jurisdiction to deal with it because it was not before them; and, secondly, as it is not embodied in the

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order the mention of it in the judgment is of no binding effect upon anybody.

The appeal therefore succeeds.

WARRINGTON L.J. I am of the same opinion. The principal question is as to the jurisdiction of the tribunal of appeal to make the order complained of. Their jurisdiction arises under s. 25 and s. 182 and the following sections of the London Building Act, 1894. The question arises in this way. By s. 22 of the Act "no building or structure shall without the consent in writing of the Council be erected beyond the general line of buildings in any street or part of a street, place, or row of houses in which the same is situate"; and "such general line of buildings shall, if required, be defined by the superintending architect by a certificate." By s. 25, "the local authority or any person deeming himself aggrieved by the certificate . . . . may appeal to the tribunal of appeal." This case relates to a portion of the north side of Euston Road between Osnaburgh Street and Hampstead Road. The jurisdiction of the superintending architect was invoked by the desire of the owner of a plot in the part of Euston Road between C and D on the plan to which I refer later. The architect gave a certificate that "the general line of buildings on the northern side of Euston Road, St. Pancras, between Hampstead Road and Osnaburgh Street is as defined by a strong red line on the plan" signed by him. The effect of that is twofold. First, he finds, as he was entitled to find, that the part of the street in which the building or structure in reference to which the question arose was situate was that part of Euston Road which lies between Hampstead Road and Osnaburgh Street; and, secondly, he finds what is the general line of buildings in that part of the street. So far there is no question of jurisdiction. The superintending architect was at liberty to take the building in question as being situate in that part of the street the termini of which he stated. The parties aggrieved by the certificate appealed to the tribunal of appeal. The tribunal dealt with the portion of the street—I advisedly do not use the word "part" here—between Osnaburgh Street and

Hampstead Road in three sections, one, A to C, beginning at the west and stopping short of the building or structure giving rise to the proceedings: a section C to D, which includes that building or structure; and a section D to E, which is the eastern section. When the tribunal did that, it seems to me that they determined that the "part of the street" in which the building or structure was situate was the part between C and D. Having divided that portion of the street into these three sections they proceeded to lay down a different building line for that part which lies to the east of D and to say that there was no building line in that part which lies to the west of C. That is a determination, contrary to that of the superintending architect, that the building as to which the question arose was situate in the part of the street between C and D, and then as to that part of the street they laid down as the general line of buildings the line which had been adopted by the architect. Having done that, the jurisdiction conferred by the section had been exercised. They had then determined the general line of buildings in that part of the street in which the building or structure was situate. That was all they had to do under the section, and when they proceeded to determine that there was no general line of buildings between A and C and a different line between D and E, they exceeded their jurisdiction. It was contended for the respondents that, as under s. 183 of the Act the tribunal of appeal had power to confirm or reverse or vary the decision of the superintending architect and make any such order as they thought fit, they had power to make the order complained of. They can, however, only make an order in reference to the matter before them, and the matter which came before them was as to the determination of the general line of buildings in that part of the street in which the building was situate, and when they had ascertained that they had no further jurisdiction to make any order at all.

For these reasons I think that they had no jurisdiction to make the order complained of, after reversing, as they were entitled to do, the certificate so far as regards A to C; that is to say, the order so far as it reverses the certificate as to A to C

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stands, but they had no jurisdiction to add the words "and we decide and determine that as between the said limits there is no general line of buildings."

I agree as to the other points.

SCRUTTON L.J. I agree in the result, and desire to express my opinion on the main question raised having regard to the difference of opinion in the Divisional Court.

Under s. 22 of the London Building Act, 1894, it is an offence in certain circumstances to erect a building beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate. Obviously an offence described in those terms is of an indefinite character, and is one which may easily be committed by a person who does not know or forms an incorrect judgment as to what the general line of buildings is in the part of the street where his house is situate, and therefore it is provided that the general line of buildings shall, if required, be defined by the superintending architect by a certificate. Primarily the general line of buildings is only relevant as regards the particular place where the building is to be erected. It is at that point that it is desired to know what is the general line. But in order to ascertain the general line at that place it may be necessary to consider further parts of the street on either side in order to get a general view of the line of buildings, and not merely the particular view which might result from looking only at the particular plot or the immediately adjoining plots. Therefore it has been decided by authority by which we are bound that it is open to the superintending architect to consider parts of the street other than the particular plot on which the building is to be erected, and that he is the judge of fact in the first instance as to how much of the street it is necessary for him to consider in fixing the general line of buildings applicable to that plot. He is not, however, the final authority upon the matter, as there is an appeal to the tribunal of appeal: and just as he is empowered to consider so much of the street in fixing the line, so it is open to the tribunal on that question of fact to confirm or

reverse or vary him. If they take the same extent of street in fixing the general line that he does, no question of jurisdiction arises. They may think it necessary, in order to settle the building line at the particular place, to consider more of the street than the architect has considered. They are entitled to do so. *In re London County Council* (1) and *London County Council* v. *Galsworthy* (2) are instances of this. That is not the case before us, and I desire to reserve my opinion, where the tribunal of appeal take a larger view of the general line of buildings than that taken by the superintending architect, as to how far the line which they lay down is binding on lands within the extended portion which the architect did not consider.

In this case the superintending architect in considering the general building line fixed it from A to E. The tribunal of appeal have said that they can fix the line for this particular plot of land by considering the street from C to D. Having done that, they had no jurisdiction to say anything about the street from A to C except to say that it was not necessary to consider A to C in order to fix the general line of buildings for the plot coloured blue. On the hypothesis upon which they proceeded to fix the general building line applicable to the plot where the building to be erected was it was not necessary to consider A to C, and if so they had no jurisdiction to fix the general building line from A to C, or to say that there was no general building line. It would not be open to the architect to say that, being required to fix the general building line as applicable to plot A, he would do so, but that this was a convenient time also to fix the line for the rest of the street though it did not affect plot A. It is equally beyond the jurisdiction of the tribunal of appeal, after saying that they can fix the general building line in reference to plot A by a particular limit, to go on to say that as the parties are before them they will deal with the rest of the street though it is not necessary to do so for the purpose of fixing the line as applicable to plot A. Upon these grounds the tribunal of appeal, having come to the conclusion that to fix the general line of

(1) (1904) 91 L. T. 501. (2) [1918] A. C. 851.

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buildings for this particular building they need only consider the street from C to D, went beyond their jurisdiction in deciding that there was no general line of buildings from A to C. I say nothing as to D to E. Upon the main point I agree with the judgment of Atkin J.

Upon the other points I agree.

Appeal allowed.

Solicitor for appellants : *D. P. Andrews.*

Solicitor for respondents : *I. B. Pritchard.*

The order as drawn up, omitting formal parts, was as follows :—" This Court in answer to the questions of law submitted in and by the special case stated by the tribunal of appeal constituted under the London Building Act, 1894, for the opinion of the Court below is of opinion that the said tribunal of appeal, having affirmed the certificate of the superintending architect of metropolitan buildings as to the part between the limits C and D in the plan C1 annexed to the decision of the tribunal of appeal, dated the 17th day of January, 1910, being the part in which the building or structure as to which the questions arose is situated, and having reversed the said certificate as to the parts between the limits A and C on the said plan, were not entitled (1.) to define the general line of buildings between the said limits A and C, or (2.) to determine that there was no general line of buildings between these limits, and (3.) that the said tribunal had no jurisdiction to determine in what street or streets the buildings to the west of the point B on the said plan were situated or to determine that such last-mentioned buildings were not in the Euston Road at all ; and doth therefore order that this appeal be allowed, that the said order of the King's Bench Division be rescinded, and that the decision, order, or determination of appeal be amended by deleting the words ' and we decide and determine that as between the said limits there is no general line of buildings ' in the first paragraph of the said decision, order, or determination."

W. F. B.

[IN THE COURT OF APPEAL]

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Dec. 2, 3.

ADMIRALTY COMMISSIONERS *v.* PAGE AND OTHERS.(1)

[1918 A. 113.]

Ship—Salvage—Tug requisitioned by Admiralty—Demise of Tug to Crown—Right to Salvage—Ship "belonging to His Majesty"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping (Salvage) Act*, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

By s. 557, sub.-s. 1, of the Merchant Shipping Act, 1894, "Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service . . . ."

By s. 1 of the Merchant Shipping (Salvage) Act, 1916, "Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty."

A tug belonging to the defendants was requisitioned by the Admiralty upon terms which amounted to a demise of the tug to the Admiralty. The tug rendered salvage services to another vessel in respect of which a salvage award was made:—

Held, that the tug having been demised to the Admiralty was a "ship belonging to His Majesty" within the meaning of s. 1 of the Merchant Shipping (Salvage) Act, 1916, and that therefore the Admiralty, and not the owners of the tug, were entitled to the salvage award.

Decision of Bailhache J. [1918] 2 K. B. 447 affirmed.

APPEAL from a decision of Bailhache J. (2)

(1) By arrangement the appeal in this case was heard together with an Admiralty appeal in the case of *The Messina* in which the owners of the steam-towing vessel *Warrior* appealed from a decision of Hill J. which followed the decision of Bailhache J., in this case declaring that the Admiralty Commissioners were entitled under similar circumstances to salvage remuneration earned by the *Warrior* in assisting the *Messina*. The judgments of the Court of Appeal, as delivered, dealt with both cases; but for the purposes of this report it has not been thought necessary to refer to the case of *The Warrior*.

(2) [1918] 2 K. B. 447.

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The defendants' tug, the *Conqueror*, was requisitioned on October 4, 1914, by the Admiralty, acting under the powers conferred by the Proclamation of August 3, 1914, upon the terms of the Expeditionary Force Charterparty, known as Charterparty T. 99, under which the owners had to provide and pay for all wages, provisions, and all other expenses in connection with the officers and crew, and for the insurance of the vessel, while the Admiralty were liable for the expense of all coal and other fuel. The owners were to be liable for sea risk, while the Admiralty were liable for war risk. The charter provided that all salvage was to be for owners' benefit, but the ship was to be deemed off hire during the time occupied in salvage operations.

The Director of Transports on September 12, 1916, wrote to the defendants (inter alia) that the basis of hire would be altered from gross to net basis. The defendants on September 13 consented to those terms, but a charterparty providing for that basis of payment was never signed. The form of charterparty providing for payment on net basis was headed "Charterparty . . . . with demise to the Crown," and provided that the vessel while she was on hire would be at the absolute disposal of the Admiralty and under their complete control, and that all risk and expense of vessel, crew, and stores would be borne by the Admiralty, who undertook to restore the vessel to the owners at the termination of her service in the same condition in which she was when taken up, fair wear and tear excepted. The *Conqueror* was thereafter commissioned as one of His Majesty's ships, and was employed at the sole risk and expense of the Admiralty. The master held a commission as lieutenant in the R.N.V.R., and he and the other members of the crew received from the Admiralty and wore uniforms according to their rank, and were paid by the Admiralty.

In January, 1917, while the *Conqueror* was in the possession and control of the Admiralty, salvage services were rendered by the *Conqueror* and other vessels to the steamship *Sussex*, and a claim for remuneration for such salvage services was made by the defendants as owners of the *Conqueror*. It was

agreed that the amount to be paid as remuneration for the salvage services should be determined by an arbitrator. The Admiralty claimed that they were entitled to the salvage paid for the services of the *Conqueror*. Eventually it was decided that the amount payable should be decided by the arbitrator without prejudice to the claim of the Admiralty that whatever sum might be awarded was payable to the Admiralty. The arbitrator awarded that the sum of 4500*l*. was due to the owners of the *Conqueror* as remuneration for the salvage services.

The Admiralty Commissioners in this action claimed a declaration that they were entitled to the remuneration earned by the salvage services rendered by the tug *Conqueror* to the *Sussex*, her cargo and freight, in January, 1917, and assessed at the sum of 4500*l*. by the arbitrator.

Bailhache J. held that the *Conqueror* having been demised to the Admiralty was a "ship belonging to His Majesty" within the meaning of s. 1 of the Merchant Shipping (Salvage) Act, 1916, and that therefore the Admiralty and not the owners of the *Conqueror* were entitled to the salvage award. He accordingly gave judgment for the plaintiffs.

The defendants appealed. The appeal was heard on December 2, 3, 1918.

R. A. Wright K.C., *Stuart Bevan* and *G. A. Scott* for the appellants. It is submitted that the change of the hire from the gross to the net basis did not have the effect of a demise of the tug to the Crown. The tug did not thereby become a "King's ship." The object of the change was to secure to the master and crew the protection offered by wearing the King's uniform. The appellants had no reason to suppose that the change from the gross to the net basis would deprive them of the benefit of remuneration for salvage services. In January, 1915, the *Vanquisher*, and in March, 1916, the *Revenger*, which were both tugs belonging to the same owners as the *Conqueror* and both hired by the Crown on the net basis, rendered salvage services and received remuneration from the owners of the salved vessels without any objection being raised by the Admiralty. The change from the gross to the net

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basis merely implied a change in the possession of the ship, and not a change of property so as to confer on the Admiralty the right of ownership. The *Conqueror*, therefore, not being a "ship belonging to [His] Majesty," the Admiralty Commissioners are prevented by s. 557 of the Merchant Shipping Act, 1894, from claiming salvage in respect of services rendered by her. Sect. 1 of the Merchant Shipping (Salvage) Act, 1916, does not assist the respondents. It merely enables the Admiralty Commissioners to claim against the owners of a salved vessel in respect of services rendered by a ship "belonging to His Majesty" which they could not previously have done.

[SWINFEN EADY M.R. referred to *The Sarpen*. (1)]

The matter in the present case turns on the correspondence, and the onus is on the Admiralty Commissioners to prove affirmatively that the appellants were deprived of the valuable right of salvage.

[SWINFEN EADY M.R. The question is whether at the time the salvage services were rendered the ship was a King's ship.]

It is submitted she was not. The judgment of Bailhache J. does not give sufficient weight to the course of dealing between the parties. The words "any ship belonging to His Majesty" are words referring to property and not to demise. They are not apt to describe the position where the property in the ship remains in the owners. The point was discussed in *The Sarpen* (1) although it did not arise for decision, and Bailhache J. held himself bound by the opinion there expressed.

MacKinnon and C. R. Dunlop for the respondents.

The Act of 1916 was passed to remove the disability attaching to King's ships by s. 557 of the Act of 1894. It is submitted that a ship "belonging to His Majesty" includes a ship demised by charterparty. In *Sir John Jackson, Ltd.* v. *Owners of Steamship Blanche* (2) the House of Lords held that a charterer of a ship by demise who had control over her and navigated her by his own master and crew was "owner" of the ship within ss. 503 and 504 of the Act of 1894. By

(1) [1916] P. 306. (2) [1908] A. C. 126.

s. 71 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), ss. 502 to 509 of the Act of 1894 are to be read so that the word "owner" shall be deemed to include any charterer to whom a ship is demised. Prima facie the person to whom a ship is demised is entitled to the right to salvage, and the onus is therefore on the appellants to show that the Admiralty have been deprived of that right.

[They were stopped.]

SWINFEN EADY M.R. This is an appeal from a judgment of Bailhache J., and it raises the question whether in reference to salvage services rendered by the tug *Conqueror* the amount payable in respect of the services belongs to the Admiralty or is payable to the owners of the tug which was under charter to the Admiralty. The tug was originally taken up on terms known as the terms of the Charterparty T. 99, a form of charterparty under which many vessels were taken up for Government service, and under which the owners engaged and paid the crew, and found stores other than coal, and worked the ship, ran the marine risks, owners insuring against those risks, and the Admiralty, on the other hand, bearing war risk, and finding coal. In respect of vessels so taken up a clause in the Charterparty T. 99 provided that the steamer was at liberty to assist vessels in distress, and all salvage was to be for owner's benefit, but the ship was to be deemed off hire during the time occupied in salvage operations, and the cost of coal consumed in such operations and port charges and expenses were to be for owner's account.

Claims have been made for salvage by ships taken up under T. 99, and in *The Sarpen* (1), which came before this Court, it was held that the owners of the ship were entitled to the salvage and to prosecute a claim for it, and that the master and crew were entitled to prosecute a claim without the consent of the Admiralty. In that case it was pointed out (2) that where a ship was a King's ship, "no claim to salvage could be made on behalf of the ship, whether with or without the consent to the Admiralty; the claim must be limited

(1) [1916] P. 306. (2) Ibid. 314.

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to a claim by the commander and crew; it is this claim which requires the consent of the Admiralty for its prosecution in the case of a vessel belonging to His Majesty."

After that decision there was passed on August 23, 1916, the Merchant Shipping (Salvage) Act, 1916, which by s. 1 provides: "Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in section 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty." It appears that before the passing of that Act, when ships belonging to His Majesty were unable to put forward a claim for salvage, two tugs belonging to the owners in the present case, the Elliott Steam Tug Company, Ltd., did in fact render services to two vessels, and were allowed to obtain and retain salvage remuneration. The question arising on the present appeal with regard to the tug *Conqueror* is, whether having been originally taken up on T. 99, which was on the gross basis, the owners paying the charges I have already mentioned, but at a subsequent date, and before the salvage services were rendered, having been converted into a taking up on a net basis, the owners are entitled to the salvage remuneration, or whether it belongs to the Admiralty.

By letters passing on September 12 and 13, 1916, an alteration was made with regard to the *Conqueror*, the alteration being from a gross to a net basis, as from December 1, 1916. The reason for the change was obvious. The change led to the ship being a ship commissioned by His Majesty; the commander held His Majesty's commission, and belonged to the Royal Naval Volunteer Reserve, His Majesty's uniform being worn; and the Admiralty bearing all expenses of running the ship, entering into articles with the crew, paying wages, buying ship's stores, bearing all marine risk as well as war risk—in fact, taking over the entire ship as a ship commissioned by His Majesty, and bearing all the expenses of running the

ship, and incurring all the risk that attached. Subject to fair wear and tear, all risk was the risk of the Admiralty.

A ship taken up on these terms is effectively demised to the Crown. The owners are no longer managers of the ship, but it is managed by the Admiralty. Under these circumstances, how is it possible to hold that the owners can have any claim whatever for the salvage? They incur no expenses, run no risk. The whole of that is for the Admiralty.

It was pointed out in *The Sarpen* (1), where the earlier decisions were referred to, that where a ship is under actual demise to the Admiralty it is for the time being "a ship belonging to His Majesty" within the meaning of the sections in the Merchant Shipping Act, 1894, where that expression is used. That being so, I am of opinion that the grounds on which Bailhache J. proceeded in holding that in this case the Admiralty were entitled to salvage, are indisputable. It is a claim in respect of a ship on demise to the Admiralty where the salvage services are rendered at the expense of the Admiralty, the crew, stores, coal, all expenses being provided by the Admiralty, and where all risk of injury to the ship and apparel is all for the Admiralty, and where the owners incur neither risk nor expense. The services were rendered after the passing of the Act of 1916, so that the Admiralty, coming within the terms of the Act, are entitled to claim the salvage. It was urged that in respect of other tugs of the Elliott Steam Tug Company, Ltd., the *Vanquisher* and the *Revenger*, which also were on a net basis at a time when the salvage services were rendered, the owners were allowed to claim and retain the amount. But as between themselves and the ship to which services were rendered the question whether the owners were entitled to salvage does not now arise. They obtained the salvage, and their claim to retain it is not now disputed. So far as the Admiralty are concerned the Admiralty would have no claim because the services were rendered at a time when no claim could be made on behalf of a King's ship, and therefore no claim is put forward by the Admiralty in respect of salvage earned and obtained by those two vessels.

(1) [1916] P. 306.

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But with regard to the one with which we have to deal on this appeal, the *Conqueror*, seeing that it was on a net basis at the time the services were rendered, it was held on demise to the Crown, and so I am satisfied the judgment appealed from was perfectly correct, and that the owners have no claim to any part of the salvage. For these reasons I am of opinion that the appeal fails, and must be dismissed.

DUKE L.J. I agree. The effect of the transactions in this case on the part of the Crown has been to vest the vessel, at any rate for the period when the vesting and divesting occurred, absolutely and indisputably in the Crown as a King's ship, with a King's officer in command, a King's crew in charge, the whole of the expenses being at the public charge through the Admiralty, and the whole of the risk at the cost of the public. I cannot conceive how in that state of facts it could be contended successfully that owners of the tug, who are ultimately entitled to have the ship revested in them, can be regarded as having rendered the salvage services which were here rendered. The services were rendered by His Majesty's servants and his ship, which was at the risk of the State. That being so, it seems to me clear that the owners could not be entitled to salvage here. The Merchant Shipping (Salvage) Act, 1916, has made it possible that the public Exchequer should benefit from salvage services rendered by vessels which are especially adapted for the rendering of such services, and I think it would be a very mischievous consequence if the right of the Crown in respect of such services as have been rendered in this case, should be divested out of the Crown upon the kind of casual and ambiguous incidents which were relied upon to support this appeal.

I therefore think this appeal ought to be dismissed.

EVE J. I agree. The answer to Mr. Wright's concluding submission on the construction of the Act of 1916 seems to me to have been supplied by Mr. MacKinnon when he pointed out that if the tug is not a "ship belonging to His Majesty", within the meaning of s. 1 of the Act of 1916, it is obviously

not under the disability imposed by s. 557 of the Act of 1894, where the words of description are identical.

I think the appeal fails and ought to be dismissed.

Appeal dismissed.

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Solicitors for appellants: *Thomas Cooper & Co.*

Solicitors for respondents: *The Treasury Solicitor.*

W. I. C.

ATLANTIC MUTUAL INSURANCE COMPANY *v.* KING.

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[1917 A. 176.]

Insurance (Marine)—Policy on Cargo—"Warranted free from all consequences of hostilities"—Damage caused by Infernal Machine placed in Ship's Hold by German—Evidence of Agency for German Government—Liability of Insurer.

A policy of re-insurance upon goods per named steamship from Bahia to New York contained the usual f. c. and s. clause, the material words of which were "Warranted free from all consequences of hostilities or warlike operations whether before or after the declaration of war":—

Held, that the word "hostilities," as used in the clause, meant hostile acts, by persons acting as the agents of Sovereign Powers, or of such organized and considerable forces as were entitled to the name of rebels, as contrasted with mobs or rioters, and did not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action might be.

Held, further, that the word "agent" in this connection was not limited to the strictness with which the words agent and principal are used in business transactions.

A person is acting as the agent of his Government within the meaning of the clause when, knowing that the settled and concerted policy of that Government is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy.

ACTION in the commercial list tried before Bailhache J.

The action was brought to recover a loss upon a policy of reinsurance dated July 20, 1916, underwritten by the defendant upon (inter alia) goods per s.s. *Tennyson*, from Bahia to New York.

The questions raised for determination in the action appear

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from the following summary of the facts and the contentions of the parties.

In the early morning of February 18, 1916, when the *Tennyson* was five days out from Bahia on her way to New York, an explosion occurred in her hold. The explosion was due to an infernal machine, which had been placed in the hold at Bahia by a man named Niewerth, a German subject resident at Bahia, aided by an accomplice. The explosion killed three seamen and wrecked the afterpart of the steamship, and was followed by a fire, which burnt a parcel of hides and skins. The hides were insured by the plaintiffs under a floating policy. They had been duly declared, and the plaintiffs were bound to pay, and did pay, a particular average loss. The plaintiffs were re-insured under the policy dated July 20, 1916. This action was brought to recover the defendant's proportion of the loss paid by the plaintiffs. The defendant's policy contained the usual f. c. and s. clause, and the defendant relied on that clause as an answer to the plaintiffs' claim. The effect of the clause was to withdraw from the protection of the policy certain of the risks which would otherwise be covered by it. The material words of the clause on which the defendant relied were : " Warranted free from all consequences of hostilities or warlike operations, whether before or after the declaration of war," and he contended that the fire which burnt the hides was due to a hostile act and was a consequence of hostilities, and was thus withdrawn from the policy and within the exceptions. In one sense it was plainly true that the fire was due to a hostile act, but the learned judge held that the plaintiffs rightly contended that the word " hostilities," as used in the clause, meant hostile acts by persons acting as the agents of Sovereign Powers, or of such organized and considerable forces as were entitled to the dignified name of rebels, as contrasted with mobs or rioters, and did not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action might be.

The defendant contended that in the circumstances in which Niewerth placed the bomb in the *Tennyson's* hold,

which fully appear from the judgment, he must be taken to have been acting as an agent of the German Government, and that even upon the construction placed by the learned judge upon the words "consequences of hostilities," used in the f. c. and s. clause, he brought himself within the clause. The plaintiffs contended that Niewerth's act was a mere piece of private devilment, and that the f. c. and s. clause was thus no answer to their claim.

R. A. Wright K.C. and *Raeburn* for the plaintiffs.

Leck K.C. and *Simey* for the defendant.

The points relied on during the arguments appear from the judgment.

The following authorities were referred to: *Cory & Sons* v. *Burr* (1); *Kleinwort* v. *Shepard* (2); *Powell* v. *Hyde* (3); *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co.* (4); *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (5); *Munro, Brice & Co.* v. *War Risks Association* (6); *Ionides* v. *Universal Marine Insurance Co.* (7); *Palmer* v. *Naylor* (8); *Nesbitt* v. *Lushington* (9); *Driefontein Consolidated Gold Mines* v. *Janson* (10); the definition of Piracy in Chalmers' and Owen's Marine Insurance Act, 1906, 2nd ed., pp. 157, 178; Hall on International Law, 6th ed., pp. 252, 510, 615; and Carver on Carriage by Sea, 6th ed., p. 131, s. 94.

Cur. adv. vult.

Dec. 13. The following judgment was read by

BAILHACHE J. In the early morning of February 18, 1916, when the steamer *Tennyson* was five days out from Bahia, on her way to New York, an explosion occurred in her No. 4 hold. The explosion was due to an infernal machine which had been placed in the hold at Bahia by a German named Niewerth, aided by an accomplice named Fordham, alias Van Dam, and possibly also alias Duquesne. The explosion killed three seamen, wrecked the afterpart of the steamer, and was followed by

(1) (1883) 8 App. Cas. 393.
(2) (1859) 1 E. & E. 447.
(3) (1855) 5 E. & B. 607.
(4) [1909] 1 K. B. 785.
(5) [1902] 2 K. B. 489.
(6) [1918] 2 K. B. 78.
(7) (1863) 14 C. B. (N. S.) 259.
(8) (1854) 10 Ex. 382.
(9) (1792) 4 T. R. 783.
(10) [1900] 2 Q. B. 339, 342.

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a fire which burned a parcel of hides and skins in the same hold. The hides were insured by the plaintiffs under a floating policy. They had been duly declared, and the plaintiffs were bound to pay, and did pay, a particular average loss. The plaintiffs were reinsured under a policy dated July 20, 1916, underwritten by the defendant. This action is brought to recover the defendant's proportion of the loss paid by the plaintiffs. The defendant's policy contains the usual f. c. and s. clause, and the defendant relies upon that clause as an answer to the plaintiffs' claim. The effect of the clause is to withdraw from the protection of the policy certain of the risks which would otherwise be covered by it. The material words of the clause on which the defendant relies are: "Warranted free from all consequences of hostilities or warlike operations, whether before or after declaration of war"; and he contends that the fire which burned the hides was due to a hostile act, and was a consequence of hostilities, and is thus withdrawn from the policy and within the exception.

In one sense it is plainly true that that fire was due to a hostile act, but the plaintiffs say rightly, as I think, that the word "hostilities," as used in the clause, means hostile acts by persons acting as the agents of Sovereign Powers, or of such organized and considerable forces as are entitled to the dignified name of rebels as contrasted with mobs or rioters, and does not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action may be.

Having got thus far, the plaintiffs contend that Niewerth's act was a mere piece of private devilment, and that the f. c. and s. clause is thus no answer to their claim. The defendant, on the other hand, contends that Niewerth must be taken to have been acting as an agent of the German Government, and that—even upon my construction of the words "consequences of hostilities" as used in the f. c. and s. clause—he brings himself within the clause.

In considering which of these contentions is the correct one, it must be borne in mind that the plaintiffs, having

proved a loss by fire, have prima facie brought themselves within the policy, and the burden of bringing himself within the exception lies upon the defendant. The plaintiffs ought to succeed if there is no evidence to support the defendant's view, or if the evidence is so evenly balanced that I cannot say that the defendant's view is the right one.

The facts upon which I am asked to form my conclusion are, with two or three exceptions, of the most general character. Those relating directly to Niewerth are, first, one relied on by the plaintiffs. It appears that Niewerth was tried for his offence and convicted under the municipal laws of Brazil (Article 146 of the Criminal Code), and that the offence was not treated as a breach of neutrality, as it should have been if he was an agent of his Government. I do not attach much weight to this. Niewerth was brought to justice apparently with some reluctance on the part of the authorities. He was tried by a provincial judge, and I do not suppose the Brazilian Government knew of the matter; or, if they did, would wish to make it the subject of diplomatic protests. The three other facts relating to Niewerth are these: First, his house was the resort of German sailors whose ships were interned at Bahia, a matter of some importance, in view of certain instructions issued on behalf of the German Government, which I will presently read. Second, he was the manager of an electrical works. Third, Niewerth had no personal end to gain. There was no chance of loot. The other facts are those notorious facts of which the defendant contends a judge, in dealing with a case of this kind, ought to take judicial notice. They may be summarized thus: Germany has throughout the war used her civilian subjects in foreign countries, and they have served her, in a way and to an extent hitherto unexampled. For instance, spying has been almost universal. Every German spy is, of course, an agent of the German Government, and many German civilians in all grades of society have acted as spies. Germany has not made war by her men in uniform alone, but by all her subjects, wherever found, who were willing to help her by doing such mischief as each in his

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particular circumstances was able to compass. Niewerth, as a manager of electrical works, was peculiarly well able to construct an infernal machine. British ships were the special object of German spite, as witness the unrestricted submarine warfare, and no service could be more welcome or more in accord with the German policy of frightfulness than that of blowing one up. The defendant produced a list of 27 ships in respect of which similar outrages had been committed; although none, I think, except the *Tennyson*, sailed from Brazil. A circular (1) was issued on behalf of the German Government, dated November 28, 1914, in the following terms :—

" From Naval General Staff to the naval attachés [Version C *reads* agents] :

" You are ordered to mobilise immediately all destruction agents and observers [agents-observers and agents-destroyers] in those commercial and military ports where munitions are being loaded [may be loaded] on ships going to England, France, Canada, the United States of North America, and Russia, where there are storehouses of such munitions and where [naval] fighting units are stationed. It is necessary to hire through third parties who stand in no relationship to the official representatives of Germany, agents for arranging explosives [explosions] on ships bound for enemy countries, and for arranging delays, embroilments, and confusions during the loading, dispatching, and unloading of ships. For this purpose we are specially recommending for your attention loaders' gangs, amongst whom there are many anarchists and escaped criminals [and that you get in touch with (2)] German and neutral [shipping] offices and [as a means of observing (2)] agents of enemy countries who are receiving

(1) NOTE.—The text of the circular is, in the main, that of the translation into English by an unknown translator. For convenience this is called Version A. A second translation into English, differing in extent and phraseology from the former, is styled Version B. Another version, in Russian, is referred to as Version C, and agrees, in the main, with B so far as the latter extends. Passages in brackets are in B and C, but are omitted in A. (War Information Series, No. 20, October, 1918, pp. 26, 27. Issued by the Committee on Public Information, Washington.)

(2) In the German circular, but omitted in versions A, B, and C.

and shipping the munitions. Funds required for the hiring and bribing of persons necessary for the designated purpose will be placed at your disposal at your request.—(Signed) No. 93, Secret Service Division of the Naval Staff.—KOENIG."

[*Original translator's comment (as part of the document)*]:

"The above document was among the documents seized during the investigation of the fire of the storehouses of the firm of Iversen, and among the documents of Consul Gering and Vice-Consul Gerold."

The admission of the circular as evidence was objected to by the plaintiffs, but there is no reason to doubt its authenticity, and it has a direct bearing upon the problem I am trying to solve. It is useful, too, as showing that the facts which I am asked to treat as notorious are not the mere speculations of the club or the street.

It now remains to consider whether these facts, taken together, are sufficient to enable me to say that the balance of probability in favour of Niewerth having acted as an agent of the German Government is so great that I ought to hold that he did so. This must largely, I think, depend upon what is meant by the word "agent" in this connection. If the word is limited to the sense in which it is used in a civil action I should say further proof was wanted. Niewerth had no express authority. There is no evidence that he saw the instructions I have just read, although they were obviously meant to be widely circulated. Nor is there evidence of any subsequent ratification. He does not appear to have received the Iron Cross. I do not, however, think that the word "agent" in this connection is limited to the strictness in which the words "agent" and "principal" are used in business transactions. I am disposed to think that a man is acting in such a case as this as the agent of his Government when knowing that the settled and concerted policy of that Government is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy. It clearly

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would be so if in this case Niewerth had given such information to a German submarine as enabled it to torpedo the *Tennyson*. It is not the less so, in my opinion, if, having the means, he pursues the surer and simpler course of blowing her up himself.

The result is that, in my judgment, the defendant has made out his case, and the action fails.

Judgment for defendant.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendant: *W. A. Crump & Son.*

J. E. A.

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Dec. 12, 16, 18, 20.

MUSGROVE *v.* PANDELIS.

Fire—Liability for Damage by—Defence that Fire "accidentally began"—Negligence in not checking Spread of Fire—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 86.

The plaintiff was possessed of some furnished rooms situate over a garage in the occupation of the defendant. In that garage the defendant kept a motor car. The defendant's servant, C., was sent to clean the car. As he required to move it for that purpose, but was unable to move it himself, he started the engine, when from some unexplained cause the petrol in the carburettor caught fire. If C. had at once turned off the tap of the pipe leading from the petrol tank to the carburettor the small quantity of petrol in the carburettor would have speedily burnt itself out, and no damage would have been done. But he neglected to do so, with the result that the fire spread to the body of the car, and the garage and the plaintiff's rooms over it were burnt with their contents. The judge found as a fact that the fire which broke out in the carburettor was accidental in the sense that it was not the result either of a wilful act or of negligence, but he found that C. was guilty of negligence in omitting to turn off the tap promptly. The defendant relied, by way of defence, on the statute 14 Geo. 3, c. 78, s. 86, which provides that "no action . . . . shall be maintained . . . . against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin":—

Held, that the defendant was not protected by the statute for two reasons:—

1. Even assuming that the fire which caused the damage could be regarded as having begun in the carburettor, it was, notwithstanding the above finding, not "accidental" within the meaning of the statute.

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A person who uses a dangerous thing like a petrol engine, the carburettor of which is not unlikely to get on fire when the engine is started, cannot, in the event of its doing so and thereby causing a fire, be heard to say that the fire was "accidental" for the purposes of the statute, even though he was not guilty of negligence in the user of the engine.

2. The fire referred to in the statute begins only at the point of time when the flames get out of control. The "fire" in this case began when the body of the car caught fire, and as the efficient cause of the fire in that sense was not the initial fire in the carburettor, but the negligence of C. in allowing the petrol to continue to flow into it, it was not the "fire" which burnt the plaintiff's property that accidentally began.

TRIAL of action before Lush J.

W. J. Head let to the plaintiff a dwelling house at Westcliff-on-Sea, with a building at the back consisting of stables and a coachhouse, with living rooms over them. The plaintiff re-let to Head the stables and coachhouse to be used as a motor garage. Head kept two motor cars of his own in a portion of that garage, and by agreement with him the defendant kept a third motor car in another portion of the garage, but whether under a verbal lease from Head or only under a licence there was no evidence to show. The case, however, proceeded on the assumption that the defendant was the tenant of the portion in which his car was kept. The defendant had in his employment a chauffeur named Coumis, who had had a few lessons in driving, but was in other respects wholly unskilled in the management of a motor car. On October 12, 1917, Coumis was sent by the defendant to clean the car. Finding that the car had been pushed close up to the wall of the garage, and wanting to get round to the other side of the car for the purpose of cleaning it, but being unable to move it himself, he went to the bonnet and turned on the petrol tap to allow of the flow of petrol from the tank to the carburettor, and started the engine, when suddenly there was an explosion, and flames were seen to be coming from the carburettor. There was no woodwork within eighteen inches of the carburettor, and if Coumis had at once turned off the tap of the pipe leading from the petrol tank the petrol in the carburettor would have soon burnt out, and the fire would have been prevented from spreading. But instead of doing so Coumis wasted his time

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in looking for a cloth which he failed to find. He then went to the bonnet to turn off the tap, but was too late, for owing to the continued flow of the petrol into the carburettor the fire had spread to the body of the car. The garage itself then caught fire and the whole building was burnt, including the plaintiff's rooms overhead, together with a quantity of furniture belonging to the plaintiff. The action was brought to recover damages for the plaintiff's loss. The evidence of experts went to show that if the fire in the carburettor was due to backfiring it could not be said to be the result of negligence, while if it was due to the valve not closing properly in consequence of some foreign matter having got into the seating, that also was a matter which could not possibly have been avoided, however much care was taken.

J. B. Matthews K.C. and *Moyses* for the plaintiff.

Hawke K.C. and *Zeffert* for the defendant. The fire which burnt the plaintiff's property began accidentally. It began in the carburettor, and the ignition of the petrol in the carburettor could not have been prevented. Therefore the defendant has a good defence under s. 86 of the Fires Prevention (Metropolis) Act, 1774. That section provides that no action shall be maintained if the "fire shall accidentally begin." Once that condition is satisfied it does not matter what happens afterwards, and the fact that Coumis may have been careless in not attempting to turn off the petrol tap sooner is immaterial. The section makes no provision for such supervening negligence, for it assumes that of course a householder whose premises have caught fire will do his best to put the fire out.

Moyses in reply. Even if the fire began accidentally Coumis was negligent in not putting it out, and that negligence is enough to deprive the defendant of the protection of the statute.

Cur. adv. vult.

Dec. 20. LUSH J. [after stating the facts as above set out, and finding that Coumis was guilty of negligence in not at once turning off the petrol tap as soon as he saw that the

carburettor was on fire, proceeded as follows :] The defendant relies, by way of defence, upon s. 86 of the Fires Prevention (Metropolis) Act, 1774, by which it is provided that "no action . . . . shall be maintained . . . against any person in whose house . . . . or other building . . . . any fire shall accidentally begin." The purpose of this legislation I would point out was to remove the common law presumption that a fire which was not proved to have been caused by some other person was caused or kindled by the householder, and to free him from liability for fires accidentally begun. It was said that this fire accidentally began. Upon that defence two questions arise. First, what is the meaning of the words "accidentally begin"? And secondly, what is the meaning of the word "fire"? It was said that the fire began in the carburettor, and that its beginning there was "accidental." I will assume that the fire did begin in the carburettor, and I agree that its origin there was, in a sense, accidental; that is to say, that it was not started wilfully, and that it could not have been prevented by the exercise of care. But, nevertheless, I am of opinion that the statute affords the defendant no protection; for though the fire in the carburettor was accidental in a popular sense, I do not think it was accidental in the sense in which that term is used in the statute. If a man brings on to his premises a dangerous thing which is liable to cause fire, such as a motor car with petrol in it, the carburettor of which is not unlikely to get on fire when the engine is started, and a fire results, though without any negligence on his part, he must be held liable, the statute notwithstanding, for the rule is that he must keep such a thing under control at his peril. If a person uses a traction engine which emits sparks in spite of all precautions being taken to prevent their emission, he will be liable if another person's hayrick be set on fire by the sparks, upon the ground that such an engine is a dangerous machine: *Powell* v. *Fall.* (1) And if the principle of *Rylands* v. *Fletcher* (2) applies to the fire in a traction engine it must equally apply to a motor car in such circumstances as these. Therefore,

(1) (1880) 5 Q. B. D. 597. (2) (1868) L. R. 3 H. L. 330.

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Lush J.

even if the fire in this case is to be treated as having begun in the carburettor, the statute will in my opinion afford no defence. But, secondly, I do not think that the fire did begin in the carburettor. The "fire" which is contemplated by the statute is not necessarily the original ignition, which may be perfectly harmless if proper steps are taken to put it out, but that stage in the fire which s reached when the flames have begun to get out of control, or in other words when the conflagration has begun. Then, and not till then, does the fire begin within the meaning of the statute. In the present case the fire in that sense did not begin until it had spread to the body of the car. No one would say that a garage was on fire merely because a fire had broken out in the carburettor, which could be easily extinguished by turning off a tap. Similarly, if a coal fell out of a domestic grate upon the carpet, and ignited a portion of it, and the householder, being present, carelessly did nothing, when he could have prevented the house from catching fire by removing or treading on the coal, and the fire spread to the curtains and burnt the house down, no one would say that the "fire" began when the coal fell out of the grate, it would have begun only when the fire got out of control, and would have been caused by negligence. The real question in this case is, What was the efficient cause of the fire that burnt the plaintiff's property? The answer is that it was the negligence of Coumis in omitting to turn off the tap of the petrol pipe and allowing the petrol to continue flowing into the carburettor so that the fire spread. That being so, the statute affords the defendant no protection.

Judgment for the plaintiff.

Solicitors for the plaintiff: *E. O'Connor & Co.*
Solicitor for the defendant: *Howard Lawrance.*

J. F. C.

LEWIS *v.* THOMAS.

1918
March 21.

Bill of Sale—True Owner—Agreement to hire with Option of Purchase—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.

A hirer of personal chattels under a hiring agreement which gives him an option to purchase them upon payment of all the agreed instalments of rent, but imposes upon him no obligation to do so, is not the "true owner" of the chattels within the meaning of s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882.

APPEAL from the Llanelly County Court.

The appellants, D. Lewis & Sons, brought an action in the Llanelly County Court against a Dr. Hoff, and having recovered judgment levied execution upon his furniture on July 30, 1917. The respondent, D. A. Thomas, a moneylender, claimed the chattels so seized as his property by virtue of a bill of sale granted to him by Dr. Hoff by way of security for the payment of money advanced. An interpleader issue was heard on November 5, 1917, the bill of sale being impeached on the ground that the grantor, Dr. Hoff, was not the true owner of the chattels at the time of granting it, and it was therefore void as against the execution creditors under s. 5 of the Bills of Sale Act, 1882, which provides that "A bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale." It appeared that the furniture in question had been hired by Dr. Hoff partly under a hiring agreement with a firm of Pugh Brothers, and partly under a hiring agreement with Bevan & Co., both being furniture dealers of Llanelly. The former agreement, dated June 14, 1916, provided that on the sum of 80*l.* 19*s.* 6*d.* being fully paid to Pugh Brothers in monthly instalments of 5*l.* each, the furniture was to become the property of the hirer, but that during the hiring it was to remain the sole and absolute property of Pugh Brothers. The agreement with Bevan & Co., dated November 9, 1916, stated that the owners, Bevan & Co., let the household goods therein specified to the hirer upon the

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terms that "the hirer agrees to pay to the owners the sum of 32*l.* 10*s.* by fourteen instalments, one instalment to be paid each successive month until the whole of the fourteen instalments shall have been duly paid . . . . provided that in the event of the hirer being desirous of terminating the hiring of the said household goods he shall be at liberty to do so at his own cost after not less than one half of the said total amount of the instalments have been paid." It also provided that if default should be made in the punctual payment of any instalment the hiring might be terminated by the owners, who might retake possession of the goods, but that in the event of the owners so resuming possession the hirer might again have possession of the goods by paying to the owners within twenty-eight days from the date of such seizure the whole of the instalments in arrear, and that "If all the instalments of hire previously due shall have been regularly paid and all the conditions of this agreement performed by the said hirer up to the payment of the last instalment, the said hirer shall be at liberty to purchase the said household goods at or for the amount of the said last instalment." It was contended that having regard to the form of those hiring agreements, Dr. Hoff, who had not fully paid the instalments due under them, had no right of property in the furniture to assign. The county court judge held that he had an equitable interest in the goods, and was thus the "true owner" within the meaning of the Bills of Sale Act, 1882. The execution creditors appealed.

Rowland Thomas for the appellants. At the date of the bill of sale Hoff had no interest to assign. He was a mere bailee with an option to purchase. The form of the hiring agreements was substantially the same as that in *Helby* v. *Matthews* (1), where the House of Lords held that a hirer of a piano under a hiring agreement by the terms of which he was under no legal obligation to buy it, but had an option to return it or become its owner by payment of the instalments in full, was not a person who had "agreed to

(1) [1895] A. C. 471, 481.

buy goods" within s. 9 of the Factors Act, 1889, and could not effect a valid pledge of it. Lord Macnaghten said: "It was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come." The House there distinguished *Lee* v. *Butler* (1), where a hirer who had bound himself to pay the whole of the hire instalments under a hiring agreement was held by the Court of Appeal to be in a position to convey a good title under the Factors Act to a bona fide purchaser for value, although at the time of the sale he had not paid the full amount of the instalments, and although the agreement provided that until they were so paid no property or interest in the chattels should vest in the hirer. The words "true owner" are used in the Bills of Sale Act in their natural and not in an artificial sense: *In re Tamplin & Son.* (2)

Barrett Lennard for the claimant. The words "true owner" do not necessarily mean a person who has the whole interest in the chattels, both legal and equitable. On the one hand "they are satisfied by the grantor being the true legal owner of the chattels at the time of the execution of the bill of sale": *In re Sarl.* (3) On the other *In re Feild* (4) shows that a limited beneficial interest is enough. An option to acquire property confers a species of proprietary interest. *Helby* v. *Matthews* (5) is not conclusive of this case, for it is consistent with the holder of an option to purchase not being a person who has "agreed to buy" within the meaning of the Factors Act that he should be regarded as sufficiently a "true owner" for the purpose of the Bills of Sale Act, to enable him to assign his rights under that option to another person. Secondly, although it is conceded that under the

(1) [1893] 2 Q. B. 318.
(2) (1890) 7 Morr. 70.
(3) (1892) 67 L. T. 597.
(4) (1890) 7 Morr. 132.
(5) [1895] A. C. 471, 478.

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hiring agreement with Pugh Brothers the grantor had nothing more than an option to purchase, under the agreement with Bevan & Co. it is otherwise, for by it the hirer agreed to pay the whole fourteen instalments of the rent. He thereby brought himself within the principle of *Lee* v. *Butler* (1), and acquired a property in the goods, though subject no doubt to its being liable to be divested in the event of his electing to terminate the agreement on payment of half the total rent.

AVORY J. The question before the county court judge was whether the claimant had a good title to the goods as against the execution creditor. For that purpose he had to determine whether the bill of sale given to the claimant was valid under the Act of 1882. That turns on s. 5. (He read the section.) The question is whether Hoff was the true owner of the goods at the time of the execution of the bill of sale. He was in possession of the goods under two hiring agreements—one with Pugh Brothers, and the other with Bevan & Co. Under the former it is not contended that Hoff was in any sense a purchaser of the goods. He was nothing more than a monthly hirer with an option to buy. There was no obligation on him to continue the monthly payments. But under the agreement with Bevan & Co. it was said that Hoff had more than an option as he had agreed to pay the whole of the instalments, and that the case consequently fell within *Lee* v. *Butler*. (1) In my opinion that is not so. There was no absolute agreement by Hoff to purchase, for he had reserved to himself a right to determine the contract. Lord Herschell in *Helby* v. *Matthews* (2) distinguished the agreement in the case before him from that in *Lee* v. *Butler* (1) on that very ground—that in the latter case "The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment." That being so, both the agreements here stand on the same footing, and I am clearly of opinion that a hirer under an agreement in that form is not the true owner of the goods hired, and cannot convey a valid title to them by a bill of sale. Whether an agreement in the form

(1) [1893] 2 Q. B. 318. (2) [1895] A. C. 471, 478.

in *Lee* v. *Butler* (1) would make the hirer a true owner for the purposes of the Bills of Sale Act it is not necessary to decide, for this case is entirely different. The county judge held that Hoff had an equitable interest in the goods. What he meant by that I do not understand, but I am satisfied that he had no interest sufficient to constitute him the owner. The appeal must be allowed.

SHEARMAN J. I am of the same opinion. The position of Hoff under both the hiring agreements was that of a bailee with an option to purchase, and nothing more. He represented untruly to the claimant that he was the owner of the goods, and the claimant advanced him money on the security of a bill of sale. That bill of sale is attacked on the ground that the grantor at the time of execution was not the true owner. *In re Sarl* (2) shows that a trustee who has only the legal interest comes within the class of owners, and on the other hand *In re Feild* (3) is an authority that a person who has only a limited beneficial interest may be treated as the true owner for the purpose of the Bills of Sale Act. But there is no case which goes so far as to say that a mere bailee with an option to purchase is a true owner. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the appellant: *Rhys, Thomas & Co. for W. Davies, Llanelly.*

Solicitors for the respondent: *H. Greenwood, Llanelly.*

(1) [1893] 2 Q. B. 318. (2) 67 L. T. 597.
(3) 7 Morr. 132.

J. F. C.

C. A.
1918
Oct. 29.

[IN THE COURT OF APPEAL.]

WILSON *v.* BLYTH SHIPBUILDING AND DRY DOCKS CO., LIMITED.

Employer and Workman—Compensation—Industrial Disease—"Beat hand"—Workman not a Miner—Due to Nature of Employment—Onus of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-ss.* 1, 2; *Sched. III.—Order of July* 30, 1913, *Sched.*

Although in Sched. III. of the Workmen's Compensation Act, 1906, as extended by the Schedule to the Order of July 30, 1913, "beat hand" is set opposite to the process of mining, yet it is a certifiable disease under s. 8, sub-s. 1, of the Act in the case of a workman who is not a miner; but in such a case the burden is on the workman to show that the disease is due to the nature of the employment.

APPEAL from an award of the judge of the Blyth County Court, sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The workman, Thomas Wilson, was employed as a riveters' holder-up by the Blyth Shipping and Dry Docks Co., who were shipbuilders and repairers. His work consisted in knocking rivets into holes and holding them up against the hammering of the riveter. In the course of that employment he became affected with the industrial disease known as "beat hand," or subcutaneous cellulitis, and procured a certificate to that effect from the certifying surgeon appointed under the Factory and Workshops Act, 1901, in accordance with s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906. He subsequently commenced proceedings for compensation under the Act of 1906. The substantial question was whether, having regard to Sched. III. of the Act as extended by the Order of July 30, 1913, he was entitled to compensation.

The county court judge held that the true construction of sub-s. 2 of the Act was to give an additional advantage to workmen in specified trades who were working in other trades "at, or immediately before the date of, the disablement," and not to confine the benefit of sub-s. 1 to workmen in those trades only. He accordingly made an award in favour of the workman.

The employers appealed.

The material provisions of the Act and Order of July 30, 1913, are stated in the judgment of Swinfen Eady M.R.

Greer K.C. and *E. Meynell* for the appellants.
Giveen for the respondent.

SWINFEN EADY M.R. This is an appeal by the employers from an award of the judge of the Blyth County Court awarding the workman compensation. The ground of the appeal is that, upon the facts, which are not in dispute, the workman has not brought himself within the Act so as to entitle him to compensation.

[His Lordship stated the facts, and continued :] Sect. 8, sub-s. 1, of the Act, provides : "Where—(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed . . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment," subject to the modifications therein stated.

Now, the particular disease with which the workman in this case was affected, although not mentioned in the original Sched. III., is contained in an extension of the schedule which the Secretary of State has made under the powers given him by the Act. The workman having obtained his certificate, the next thing he had to prove was that the disease was due to the nature of the employment. It is not disputed that he has proved that, so that prima facie he has brought himself within the Act. Sub-s. 2 of s. 8 provides that in certain cases the burden of proof is shifted from the workman to the employer. The sub-section is as follows : "If the

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workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease of the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary." The effect of that is that where a workman is for the time being engaged in a process mentioned in the second column of the Schedule, and is suffering from the disease set opposite it in the first column, the burden of proof is shifted, and the disease is to be deemed to be due to the nature of the employment, unless the employer proves the contrary. The Secretary of State, under the powers reserved to him by s. 8, sub-s. 6 of the Act, made the Order of July 30, 1913, which provides by clause 1 that: "(1.) Subject to the modifications hereinafter specified, the provisions of section 8 of the Workmen's Compensation Act, 1906, shall extend and apply to the diseases, injuries, and processes, specified in the first and second columns of the Schedule annexed to this Order, as if the said diseases and injuries were included in the first column of the Third Schedule to the Act, and as if the said processes were set opposite in the second column of that Schedule to the diseases or injuries to which they are set opposite in the second column of the Schedule annexed hereto." In the Schedule to that Order, under a description of disease numbered 15, is the disease of subcutaneous cellulitis of the hand or "beat hand" in question here, and opposite to it, in the second column, is the process "mining." This, therefore, is a disease which may be certified by the certifying surgeon under s. 8, sub-s. 1, of the Act, and if the person suffering from that disease is engaged in mining when he becomes affected with the disease, then, under s. 8, sub-s. 2, the disease is presumed to have been due to the nature of that employment; but if he is not engaged in mining, then he has to prove that the disease is due to the

nature of the employment. That is the true construction of the Schedule to the Act, and equally so of the Schedule to the Order. Here the workman proved that the disease was due to the nature of his employment. It was said, however, by the appellants that a limit must be put on the disease by reference to the process set opposite to it in the Schedule, and that the disease was not an industrial disease for the purpose of the Act unless it occurred in the process of mining, and reliance was placed on No. 12 in the Schedule to the Order relating to miner's nystagmus, where the words "whether occurring in miners or others" are added to the description of the disease; and it was argued that, as these words are absent in the case of subcutaneous cellulitis, this disease was intended to be a scheduled disease only in the case of a miner.

In my opinion that contention is not sound. It is obvious that the words of description added in No. 12 are inserted to describe the disease known as miner's nystagmus, to show that, though called miner's nystagmus, it may occur in persons other than miners, so that if it does so it shall be considered as miner's nystagmus, and shall be so certified. In my judgment the description of the disease is not limited to its occurrence in persons engaged in a particular process. The only object of referring to the process is because, in the case of a workman suffering from the disease and engaged in that process, the disease is to "be deemed to have been due to the nature of that employment, unless the employer proves the contrary." The award of the county court judge was quite right, and this appeal fails.

DUKE L.J. I agree, and have nothing to add.

EVE J. I agree.

Appeal dismissed.

Solicitors for the appellants: *Crossman & Pritchard, for Dees & Thompson, Newcastle-upon-Tyne.*

Solicitors for respondent: *Brash Wheeler, Chambers & Co., for Stanford & Lambert, Newcastle-upon-Tyne.*

W. I. C.

C. A.

1918

Nov. 15, 18, 19, 20.

[IN THE COURT OF APPEAL.]

JONES *v.* LEWIS AND OTHERS.

[1917 J. 862.]

Local Government—Assistant Overseer—Election by Inhabitants—Appointment by Justices—Power of Appointment conferred on District Council—Preservation of existing Interests—Order of Local Government Board—Increase of Salary—Justices' Warrant—Validity—Estoppel by Record—Certiorari—Poor Relief Act, 1819 (59 *Geo.* 3, *c.* 12), *s.* 7—*Poor Law Amendment Act*, 1834 (4 *& 5 Wm.* 4, *c.* 76), *s.* 105—*Local Government Act*, 1894 (56 *& 57 Vict. c.* 73), *s.* 33, *sub-ss.* 1, 4.

By s. 7 of the Poor Relief Act, 1819, "It shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discrete person or persons to be assistant overseer or overseers of the poor of such parish . . . . and it shall be lawful for any two of His Majesty's justices of the peace . . . . by warrant . . . . to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor . . . . and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer."

By s. 33, sub-s. 1, of the Local Government Act, 1894, "The Local Government Board may, on the application of the council of any . . . . urban district, make an order conferring on that council . . . . the appointment of overseers and assistant overseers, the revocation of appointment of assistant overseers . . . ." By sub-s. 4, "The order . . . . shall make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers."

Before the passing of the Local Government Act, 1894, the plaintiff was duly elected assistant overseer of the poor of a certain parish by the inhabitants of the parish in vestry assembled at a salary, in the events which happened, of 85*l.* a year, and was duly appointed by a warrant of justices. In 1896 the Local Government Board, acting under s. 33 of that Act, made an order conferring on the council of the urban district in which the parish was situate the power of appointing and, subject as mentioned in article VI., of revoking the appointment of the assistant overseer of the parish. Article VI. provided that "Nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends, nor, without his consent, to his re-appointment, and every such assistant overseer shall continue to hold office upon the same terms as at present."

In September, 1905, the inhabitants of the parish, without revoking the plaintiff's appointment and without his resigning, passed a resolution

increasing his salary by 115*l.* a year, and in August, 1906, two justices issued a warrant which, after reciting that the inhabitants had nominated and elected the plaintiff and had fixed the yearly sum of 200*l.* as his salary together with such a sum as he might be allowed for work in connection with the registration of voters, proceeded to appoint him assistant overseer to perform the duties and receive the salary fixed by the inhabitants. In an action by the plaintiff against the overseers of the parish, who refused to pay the increased salary, it was held on March 23, 1907, that the plaintiff had not been duly appointed at the increased salary, because (among other reasons) the power of re-nomination and re-election, which were necessary before the salary of an assistant overseer could be increased, had been vested in the urban district council.

In September, 1912, the inhabitants, without any resignation of the plaintiff or revocation of his appointment, resolved that he should be paid a salary of 250*l.* a year for performing the duties of overseer of the poor with certain exceptions; and in October, 1912, two justices issued a warrant which, after reciting that the inhabitants had nominated and elected the plaintiff and had fixed his yearly salary at 250*l.*, proceeded to appoint him assistant overseer to execute the duties and receive the salary fixed by the inhabitants. Doubts having arisen as to the validity of this appointment, the Local Government Board in 1915 made an order substituting for article VI. of their order of 1896 the following:—"(1.) Nothing in this order shall (*a*) apply to the revocation of the appointment of any person now holding office as assistant overseer in any parish to which this order extends; (*b*) preclude any such person as aforesaid, in the event of his ceasing to hold the said office, from being re-appointed to such office as if this order had not been made. (2.) Every person holding office, or re-appointed as aforesaid, shall hold office by the same tenure and upon the same terms and conditions as would, if this order had not been made, have attached to his holding of the said office, whether on any appointment subsisting at the date of this order or on any appointment made thereafter."

In 1916 the inhabitants again, without any resignation of the plaintiff or revocation of his appointment, resolved that the plaintiff should be paid a salary of 250*l.* a year for performing the duties of overseer of the poor with the same exceptions as before, and again two justices issued a warrant reciting his nomination and election by the inhabitants and appointing him to be overseer of the poor and empowering him to perform the duties and receive the salary fixed by the inhabitants.

In an action by the plaintiff against the overseers of the parish claiming a declaration that he was entitled under the warrant of 1912, or alternatively under the warrant of 1916, to salary at the rate of 250*l.* a year:—

Held, by Bankes and Warrington L.JJ., that under s. 7 of the Poor Relief Act, 1819, the inhabitants in vestry assembled have no power to increase the salary of an assistant overseer unless either he resigns his office, or they revoke his appointment, or it terminates by effluxion of time; and that, as none of these events had happened, the warrants of 1912 and 1916 were inoperative.

Held also, that the plaintiff was not estopped by the judgment of March 23, 1907, from contending that the power of revoking his

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appointment and re-electing him at an increased salary remained in the vestry after the order of the Local Government Board made in 1896.

Held further, that the "existing interests" mentioned in s. 33, sub-s. 4, of the Local Government Act, 1894, include in the case of an assistant overseer the possibility of being re-elected and re-appointed at an increased salary by the authorities who originally elected and appointed him; that the order of the Local Government Board made in 1896 was intra vires; and that it did not transfer to the district council the right to re-appoint at an increased salary one who was an assistant overseer at the date of the Act.

As to whether the order made in 1915 was ultra vires, quaere.

Judgment of Lush J. [1918] 2 K. B. 781 reversed.

Held obiter, affirming the opinion of Lush J. on this point, that the order of 1915, not having been made by the Local Government Board in their capacity as successors of the Poor Law Commissioners, could be questioned otherwise than by a writ of certiorari and was not protected by s. 105 of the Poor Law Amendment Act, 1834.

APPEAL from the judgment of Lush J.; reported [1918] 2 K. B. 781.

At a meeting of the vestry of the parish of Eglwysilan in the county of Glamorgan on April 6, 1893, the plaintiff with others was proposed as a candidate for the office of assistant overseer of the poor. A poll was demanded, and the plaintiff was subsequently elected. This election was held under s. 7 of the Poor Relief Act, 1819. (1) At a meeting of the vestry on

(1) (1.) The Poor Relief Act, 1819, s. 7: "It shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discrete person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by or them (sic) executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of His Majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes, and with such salary, as shall have been fixed by the inhabitants in vestry . . . . and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer."

(2.) The Local Government Act, 1894, s. 33: "(1.) The Local Government Board may, on the application of the council of any . . . . urban district, make an order conferring on that council . . . . the appointment of overseers and assistant overseers, the revocation of appointment of assistant overseers . . . . (4.) The order . . . . shall make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers . . . ." By s. 81, sub-s. 4, on a transfer of powers

March 22, 1894, it was resolved that the plaintiff, the assistant overseer, should be paid a salary of 150*l.* per annum for performing the duties pertaining to the office of overseer of the poor save and except the making and collection of the poor rate and registration of parliamentary, county, and parochial electors, and that the salary should commence as from Lady Day, 1893.

On March 28, 1894, a justices' warrant of appointment was issued appointing the plaintiff assistant overseer of the poor of the parish and authorizing him to perform the duties and to receive the salary fixed by the inhabitants.

At the time when the Local Government Act, 1894, came into operation the parish of Eglwysilan was situated partly in the urban district of Pontypridd and partly in the urban district of Caerphilly. By an order of the Local Government Board dated November 21, 1894, made under s. 36, sub-s. 1, of that Act, the parish was divided, and part thereof for the purposes of the Act became part of the united parish of Pontypridd. The plaintiff's salary was apportioned in accordance with s. 81, sub-s. 5, of the Act, but it was arranged that he should act as assistant overseer of the poor of that part only of the parish which remained in the Caerphilly urban district. His apportioned salary for this remaining portion was 85*l.* a year.

On June 2, 1896, the Local Government Board made the following order:—Article 1. "We hereby transfer to the urban district council of each of the urban districts named in the second schedule to this order"—including the urban district of Caerphilly—"the power of appointment and, subject as mentioned in article VI., of revoking the appointment of any assistant overseer for each parish wholly comprised within the urban district."

every existing assistant overseer "shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same duties shall receive not less salary or remuneration than heretofore."

The Interpretation Act, 1889, s. 32, sub-s. 1: "Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

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Article VI. "Nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends, nor, without his consent, to his re-appointment, and every such assistant overseer shall continue to hold office upon the same terms as at present."

On September 9, 1905, the overseers of the parish of Eglwysilan gave notice of a vestry meeting "to consider an increase in the salary of the assistant overseer and to pass such resolution as may be necessary to give legal sanction and effect to such additional remuneration." A meeting of the vestry was accordingly held on September 14, 1905, at which it was resolved "that the salary of" the plaintiff "as assistant overseer for this parish be increased by the sum of 115*l.* (one hundred and fifteen pounds) per annum, such increase to commence as from the 30th instant."

On August 17, 1906, two justices of the peace issued their warrant as follows:—"Whereas the inhabitants of the parish of Eglwysilan in the County of Glamorgan in vestry assembled in the said parish on September 14, in the year of Our Lord 1905, did nominate and elect" the plaintiff "to be assistant overseer of the poor of the said parish and did determine that the duties to be by him executed and performed should be all such as appertain and are incident to the office of overseers of the poor save and except the making and collecting of the poor rate and did fix the yearly sum of 200*l.* as and for the yearly salary of" the plaintiff, "and in addition thereto such sum as may be allowed by the revising barrister for work done in connection with the registration of voters, for the execution of the said office such salary to commence as from Michaelmas Day, 1905: Now we the undersigned . . . . do hereby appoint" the plaintiff "to be assistant overseer of the poor of the said parish of Eglwysilan and we do hereby authorize and empower him to execute and perform such duties and to receive such salary as aforesaid fixed by the said inhabitants in vestry."

The overseers of the parish objected to paying the salary at the increased rate on the ground that the plaintiff's appoint-

ment under that warrant was invalid. The plaintiff brought an action to recover payment of his salary at the rate of 200*l.* a year. The case was tried at the Glamorganshire Winter Assizes holden at Cardiff before Bray J., who on March 23, 1907, gave judgment for the defendants, holding that the attempt of the inhabitants to increase the plaintiff's salary failed on two grounds: (1.) because the power of re-nomination and re-election, which were necessary before the salary of an assistant overseer could be increased, had by the order of the Local Government Board of June 2, 1896, been taken from the vestry and conferred upon the urban district council; (2.) because the justices' warrant of August 17, 1906, was invalid in that it did not follow the resolution of the vestry dated September 14, 1905.

On January 30, 1907, an order was made by the Local Government Board under s. 33, sub-ss. 1 and 3, of the Local Government Act, 1894, conferring upon the urban district council of Caerphilly certain duties and liabilities of the vestry of the parish of Eglwysilan. The article effecting this provided that nothing contained therein should be deemed to transfer to the urban district council any powers, duties, or liabilities which might at any time attach to or be vested in the vestry of the parish in relation to the appointment or removal of any assistant overseer.

At a meeting of the vestry on September 19, 1912, it was resolved that the plaintiff should be paid the salary of 250*l.* per annum for performing the duties pertaining to the office of overseer of the poor save and except the making and collection of the poor rate and registration of parliamentary, county, and parochial electors. The plaintiff subsequently signed an agreement dated September 28, 1912, undertaking to repay such part of the increased salary as the district auditor might surcharge.

On October 1, 1912, two justices of the peace issued their warrant as follows:—"Whereas" the plaintiff "was on September 19, 1912, duly nominated and elected by the inhabitants of the parish of Eglwysilan then and there in vestry assembled to be assistant overseer of the said parish, and the

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said inhabitants did then and there determine and specify the following duties of overseers of the poor which by" the plaintiff "shall be executed and performed that is to say the duties pertaining to the office of overseer of the poor save and except the making and collection of the poor rate and registration of parliamentary, county, and parochial electors and the said inhabitants then and there did also fix the yearly salary of" the plaintiff "to be 250*l.* for the execution of the said office to be paid to him: We therefore . . . . do hereby appoint" the plaintiff "so nominated and elected as aforesaid to be assistant overseer of the poor of the said parish for the purpose of executing the said duties so specified and with the yearly salary so fixed by the said inhabitants in vestry assembled as aforesaid."

At the audit of the accounts of the overseers of the poor of the parish for the half-year ending March 31, 1913, objection was taken to the salary paid to the plaintiff to the extent of 50*l.* on the ground that the increase of the salary from 150*l.* to 250*l.* was invalid. The auditor by a certificate dated January 20, 1914, allowed the full salary on the ground that by the orders of the Local Government Board dated June 2, 1896, and January 30, 1907, the terms of appointment and the remuneration so far as the present holder of the office was concerned remained with the vestry and the justices of the peace. From this decision of the auditor there was an appeal to the Local Government Board, the objectors contending, and citing the judgment of Bray J. in favour of the contention, that the vestry only retained the power of revoking the appointment of an assistant overseer and not that of re-appointing him, and that his salary could not be increased except by revoking his appointment and re-appointing him.

On October 18, 1915, the Local Government Board made an order reciting that doubts had arisen as to the interpretation of article VI. of their order of June 2, 1896, and providing: "The said order dated June 2, 1896, shall so far as regards the urban district of Caerphilly, be read and have effect as if, in lieu of article VI. thereof, the following article had been contained therein, namely:—

"Article VI.—(1.) Nothing in this order shall

"(*a*) apply to the revocation of the appointment of any person now holding office as assistant overseer in any parish to which this order extends;

"(*b*) preclude any such person as aforesaid, in the event of his ceasing to hold the said office, from being re-appointed to such office as if this order had not been made.

"(2.) Every person holding office, or re-appointed as aforesaid, shall hold office by the same tenure and upon the same terms and conditions as would, if this order had not been made, have attached to his holding of the said office, whether on any appointment subsisting at the date of this order or on any appointment made thereafter."

On October 26, 1915, the Local Government Board wrote to the overseers a letter stating as follows: "Under the order now issued the appointment of the present assistant overseer can be revoked by the vestry and he can be re-elected by them and re-appointed by warrant of justices. If it is intended that he should continue to receive a salary of more than 150*l.* a year, the Board think that, in order to avoid any further difficulty, there should be a fresh appointment, and they therefore propose to defer giving their formal decision on the appeal, pending the settlement of this question."

On November 2, 1916, a meeting of the vestry was held "to consider the terms of the assistant overseer's salary and to pass such resolution or resolutions as may be necessary to give legal sanction thereto." It was proposed and seconded that the plaintiff "be paid the salary of 250*l.* per annum for performing the duties pertaining to the office of overseer of the poor, save and except the making and collection of the poor rate and registration of parliamentary, county, and parochial electors, the same to take effect as from October 1, 1916." A direct negative having been proposed and seconded and put to the meeting the chairman declared that the original resolution was carried.

On November 3, 1916, a warrant was issued by two justices of the peace in these terms:—"Whereas the inhabitants of

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the parish of Eglwysilan in the County of Glamorgan in vestry assembled in the said parish on November 2 in the year of Our Lord 1916 did nominate and elect" the plaintiff " to be assistant overseer of the poor of the said parish and did determine that the duties to be by him executed and performed should be the duties pertaining to the office of overseer of the poor save and except the making and collection of the poor rate and the registration of parliamentary, county, and parochial electors and did fix the yearly sum of 250*l.* as and for the yearly salary of" the plaintiff " the same to take effect as from October 1, 1916, for the execution of the said office: Now we the undersigned . . . . do hereby appoint" the plaintiff " to be assistant overseer of the poor of the said parish of Eglwysilan. And we do hereby authorize and empower him to execute and perform such duties and to receive such salary as aforesaid fixed by the said inhabitants in vestry."

The defendants, who were the overseers of the poor of the parish, refused to pay the plaintiff's salary at the rate of 250*l.* a year. The plaintiff brought this action claiming (1.) a declaration that he was by the warrant of October 1, 1912, duly appointed assistant overseer of the poor of the parish of Eglwysilan at a yearly salary of 250*l.* and entitled to receive that salary; alternatively (2.) a declaration that he was, by the warrant of November 3, 1916, duly appointed assistant overseer as aforesaid as from October 1, 1916; (3.) payment of the amount due to him; (4.) a mandamus commanding the defendants to make and levy a rate for the purpose of paying the amount due to him; and (5.) such further relief as to the Court might seem meet.

The statement of claim, after setting out the orders of the Local Government Board of June 2, 1896, and January 30, 1907, stated, in paragraph 4, " The plaintiff has continuously since the year 1894 held the office and performed the duties of assistant overseer of the parish of Eglwysilan in the Urban District of Caerphilly . . . . On September 19, 1912, the inhabitants of the said parish in vestry assembled acting in pursuance of the Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 7, duly nominated and elected the plaintiff to be assistant over-

seer of the said parish at the yearly salary of 250*l.* and the plaintiff was by a warrant of two of His Majesty's justices of the peace dated October 1, 1912, duly appointed assistant overseer of the parish of Eglwysilan at the yearly salary of 250*l.*"

The statement of claim proceeded to mention the audit of the parish accounts for the half-year ending March 31, 1913, the certificate of the auditor of January 20, 1914, the appeal of the overseers from the certificate to the Local Government Board, the order of the Local Government Board of October 18, 1915, and their letter of October 26, 1915. Paragraph 9 of the statement of claim was as follows :—" In order that all questions as to the validity of the appointment of the plaintiff at the yearly salary of 250*l.* might be determined, and in accordance with the advice of the Local Government Board contained in the said letter, the inhabitants of the parish of Eglwysilan in vestry assembled again duly nominated and elected the plaintiff to be assistant overseer of the poor of the said parish and fixed the yearly salary for the execution of the said office at the sum of 250*l.* and by a warrant of two of His Majesty's justices of the peace dated November 3, 1916, the plaintiff was duly appointed assistant overseer of the poor of the said parish at the yearly salary of 250*l.* from October 1, 1916."

The defence contained the following paragraphs : 1. " The defendants deny that the plaintiff is assistant overseer for the parish of Eglwysilan in the urban district of Caerphilly at the salary of 250*l.* per annum or at all. Alternatively they say that if he is assistant overseer of the said parish he is so at the yearly salary of 85*l.*, and that the warrants of October 1, 1912, and November 3, 1916, appointing him assistant overseer at a salary of 250*l.* are both of them null and void."

4. " The defendants do not admit any of the allegations of fact contained in paragraphs 4 and 9 of the statement of claim. They deny that the plaintiff was duly nominated and elected or appointed assistant overseer of the said parish on any of the dates named or at all. They will further contend that each and all of the said nominations, elections, and appointments

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of the plaintiff to the post of assistant overseer referred to in both the said paragraphs if made (which is not admitted) were invalid and not according to law."

With reference to the orders of the Local Government Board dated June 2, 1896, and October 18, 1915, the defendants in paragraph 8 of the defence pleaded: "If and so far as the said order of October 18, 1915, purports to affect or alter their said order of June 2, 1896, they" (the defendants) "will contend that the same is bad in law and ultra vires. The construction and legal effect of the said order of June 2, 1896, and of the rights and liabilities conferred thereby had on March 23, 1907, been determined in an action at law brought by the plaintiff against the defendants' predecessors in office in the High Court of Justice, King's Bench Division, and tried before Bray J. at the Cardiff Assizes. The defendants claim the right to refer to the said action and judgment and to rely upon the doctrine of res judicata in connection therewith."

The case was heard before Lush J. without a jury on July 15 and 16, 1918. Judgment was entered for the plaintiff for 261*l.* 13*s.* 4*d.*, and it was declared that the plaintiff was duly appointed by warrant of justices dated October 1, 1912, assistant overseer of the poor of the parish of Eglwysilan at the yearly salary of 250*l.* and held office under that appointment until November 3, 1916, and that on November 3, 1916, he was duly re-appointed by warrant of justices dated November 3, 1916, to the same office at the same salary and still held the said office by virtue of the last-mentioned appointment. And it was further adjudged that judgment should be entered for a mandamus, and that the defendants as overseers of the poor of the said parish should be and were thereby commanded to make and levy a rate if necessary for payment to the plaintiff of the said sum of 261*l.* 13*s.* 4*d.* and costs and any further salary that might be due to the plaintiff up to the date of the judgment in respect of the said office. Execution was stayed pending an appeal.

The defendants appealed. (1)

(1) Scrutton L.J. having fallen ill during the hearing, the parties agreed that the appeal should be heard by a Court consisting of two Lords Justices.

Upjohn K.C. and *Herbert Smith* for the appellants. 1. The order of the Local Government Board of October 18, 1915, was ultra vires. It purports to have been made under s. 33, sub-s. 4, of the Local Government Act, 1894, which enables the Local Government Board to "make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers." Such provisions were made by article VI. of the order of June 2, 1896. The section cannot mean that the Board may make a new order whenever they are so minded. They can only act on the application of the district council. When once they have made necessary and just provisions for preserving existing interests they are functi officio. Therefore the order of 1915 should be treated as a nullity.

2. As to the order of 1896 the respondent is estopped by the judgment of Bray J. in 1907 from disputing that since that order the power of increasing his salary has been vested in the district council and that the vestry have no longer any powers in that behalf: Co. Litt. 352 a, b; *Outram* v. *Morewood* (1); *Priestman* v. *Thomas* (2); *In re Graydon* (3); *Humphries* v. *Humphries* (4); *Cooke* v. *Rickman* (5); Halsbury Laws of England, Vol. 13, s. 463, p. 331.

3. The respondent is also bound by the construction put by Bray J. on s. 33, sub-s. 4, of the Local Government Act, 1894. "Existing interests" do not include the chance of being re-appointed by the vestry at a higher salary; therefore the section gave the Local Government Board no power to make an order preserving such a possibility.

4. If the power of increasing the respondent's salary remains with the vestry, it can only be exercised in accordance with s. 7 of the Poor Relief Act, 1819. The vestry must revoke the appointment and re-elect the respondent at a higher salary, and the justices must then appoint him by warrant at that salary. These steps have never been taken. The vestry purported simply to increase his salary. The justices' warrants

(1) (1803) 3 East, 346.
(2) (1884) 9 P. D. 70, 210.
(3) [1896] 1 Q. B. 417.
(4) [1910] 2 K. B. 531.
(5) [1911] 2 K. B. 1125.

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of 1912 and 1916 do indeed recite that he had been re-nominated and re-elected by the inhabitants, but those recitals are contrary to the fact. The result is that the respondent's salary has never been increased, and he holds the office of assistant overseer at his original salary of 85*l.* a year.

Montgomery K.C. and *Bethune* for the respondent. The judgment of Bray J. was res inter alios acta and does not estop the respondent to any extent. The appellants were not parties to that judgment and, not being a corporation except for the purposes of holding property, are not privies thereto. But even if they are privies to that judgment, and if there is an estoppel, the respondent is only bound by the actual point decided by the Court, which he does not dispute, namely, that in 1906 he held the office of assistant overseer at a yearly salary of 85*l.* He is not bound by the reasoning on which the judgment was based: *Outram* v. *Morewood* (1); *Ballantyne* v. *Mackinnon*. (2) The effect of the order of the Local Government Board of June 2, 1896, is therefore open for consideration in this case.

It is conceded that before the Local Government Act, 1894, the inhabitants of a parish might increase the salary of an assistant overseer by revoking his appointment and re-electing him at a higher salary, and that then by a warrant of justices he could be re-appointed at the higher salary. Article VI. of the order of 1896 was intended to preserve the existing interests of paid officers as directed by s. 33, sub-s. 4, of the Local Government Act, 1894. One of the existing interests of the respondent was a reasonable expectation of an increase in his salary. Accordingly article VI. provided that an assistant overseer should continue to hold office on the same terms as then existing, that is to say, on the terms laid down by s. 7 of the Poor Relief Act, 1819. His appointment, if revoked, is to be revoked by the vestry, and his re-appointment is to be by a warrant of justices, unless he consents to be re-appointed by the district council. Not only was it within the powers, it was the bounden duty, of the Local Government Board to make that or some similar order.

(1) 3 East, 346. (2) [1896] 2 Q. B. 455.

To resolve doubts which had arisen as to whether the order of 1896 had effected its purpose, the Local Government Board were acting within their powers, or in performance of their duty, in making their order of October 18, 1915. That was merely an amendment of their former order, which was duly made on the application of the district council. Further, by s. 32, sub-s. 1, of the Interpretation Act, 1889, an order may be made from time to time as occasion requires. In any case the order of 1915 was made under powers of the Poor Law Commissioners vested in the Local Government Board. By s. 105 of the Poor Law Amendment Act, 1834, every regulation made by the Commissioners shall be in force until declared illegal by certiorari: *Reg.* v. *Bangor Overseers* (1); *Reg.* v. *Oldham Overseers* (2); *Reg.* v. *Bristol Guardians* (3); *Newbould* v. *Coltman* (4); *Reg.* v. *Greene.* (5) Consequently both the orders of the Local Government Board were valid.

The resolutions of the vestry of September 19, 1912, and November 2, 1916, increasing the respondent's salary operated each respectively as a revocation of his existing appointment and a re-election at the increased salary: *Bamford* v. *Iles.* (6)

Counsel for the appellants were not called upon in reply.

BANKES L.J. This appeal must be allowed. I regret the conclusion, because many persons desire that the respondent's salary should be increased, but they have failed to do what the statute directs in order to increase it.

The respondent was appointed assistant overseer in the year 1893. On April 6 of that year a vestry meeting was held at which he was proposed as a candidate for the office. A poll was demanded, and presumably he was elected. For some reason his salary was not fixed until March 22, 1894, but on that date it was fixed at 150*l.* a year for performing the duties pertaining to the office of assistant overseer save and except the making and collecting of the poor rate, and the registration of parliamentary, county, and parochial electors, and it was to commence as from Lady Day, 1893. Following that there

(1) (1847) 16 L. J. (M. C.) 58.
(2) (1847) 10 Q. B. 700.
(3) (1849) 13 Q. B. 405.
(4) (1851) 6 Ex. 189.
(5) (1852) 17 Q. B. 793.
(6) (1849) 3 Ex. 380.

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was a warrant of justices dated March 28, 1894, which recited the vestry meeting of April 6, 1893, the adjournment for a poll, the determination of his duties, and the fixing of his salary, and proceeded to appoint him as assistant overseer of the poor. The nomination, election, and subsequent appointment by the justices took place under the provisions of s. 7 of the Poor Relief Act, 1819, which were sufficiently strictly followed because, in my opinion, it is not necessary that the inhabitants should nominate and elect the assistant overseer and fix his duties and salary at one and the same meeting; it is sufficient if all the necessary matters are determined before the justices are asked to appoint by their warrant. The effect of the appointment is clearly stated in the section. For the purposes of the present case the important words are "and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer." His position then was to continue until he resigned or until his appointment was revoked; and in all this litigation it never seems to have been suggested that his position could have been effectively altered until either he resigned or his appointment was revoked. Bray J. in the action tried before him seems to have taken this view. As to the opinion of Lush J. there can be no doubt. In his judgment this passage occurs:—"Now it is quite true to say that when the salary of an assistant overseer is increased it can only be done by a re-appointment; he either resigns his office or it is revoked, and he is re-appointed at a fresh salary, and that re-appointment is made by the justices just as in the case of the original appointment. The vestry re-elect and re-nominate and the justices re-appoint. That is how it is done." (1) The pleader in drawing the statement of claim took the correct view of the statute. [The Lord Justice referred to paragraphs 4 and 9 of the statement of claim alleging the nomination and election of the plaintiff by the inhabitants before his appointment by

(1) The Lord Justice cited this passage from a shorthand note of the judgment of Lush J.

the justices' warrant, and proceeded.] Now, strange as it may appear, the accuracy of those allegations never seems to have been investigated, although the issue is distinctly raised by the defence, which denies that the respondent was duly nominated and elected or appointed assistant overseer of the parish at any of the dates named or at all. Neither of the learned judges who have given judgments in this dispute seems to have had his attention drawn to the question whether the respondent was in fact duly nominated, duly elected, and duly appointed by the justices. Bray J. made no reference to the matter; Lush J. assumed that the nomination and election had duly taken place. But is that so? It appears to me to be abundantly plain that the respondent was never either re-nominated or re-elected, and consequently he was never re-appointed; and on that ground the appeal fails.

To deal with the facts more particularly, I have referred to the appointment by the justices' warrant of March, 1894. That, I think, was a good appointment; it is admitted in the defence to have been so; the appellants admit that the respondent is entitled to act as assistant overseer at a yearly salary of 85*l*. The first attempt to raise this salary was made in 1905. The notice of September 9 convening the vestry meeting was sufficient to call attention to the fact that formalities might have to be observed and anyone who wished to do so might have proposed that the respondent's appointment should be revoked and that the respondent should be re-nominated and re-elected at an increased salary. Of course that would have given opportunity for some other candidate to be nominated and elected instead of the respondent. Whether the proceedings in fact taken were designed to avoid possible opposition, we do not know. The result is the same whether they were taken by design or by mistake. The respondent's appointment was not revoked; he was not re-nominated. The vestry meeting was held on September 14, 1905; the only resolution proposed and carried was that the salary of the respondent should "be increased by the sum of 115*l*. per annum, such increase to commence as from the 30th inst." Whether the

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minutes of that vestry meeting were produced to the justices or not, we have no information. We only know that on August 17, 1906, they issued their warrant, which recited that the inhabitants of the parish of Eglwysilan in vestry assembled " did nominate and elect " the respondent to be assistant overseer, " and did determine that the duties to be by him executed and performed should be all such as appertain and are incident to the office of overseers of the poor save and except the making and collecting of the poor rate, and did fix the yearly sum of 200*l.* as and for the yearly salary," and so on. The answer made to these recitals is that nothing of the kind occurred. The warrant went on to appoint the respondent to be assistant overseer of the poor. But the office was never vacated; it continued to be full, and it was impossible for the justices to appoint a man who had never ceased to hold the office. No question is raised here as to the impossibility of going behind the warrant. The Court has been asked to decide whether this warrant and those that followed it are or are not null and void.

The next step was this: The overseers refused to pay the salary fixed by this warrant; then the respondent brought an action which was tried at the Assizes in South Wales by Bray J., who decided against him on two grounds, first that by the order of the Local Government Board made on June 2, 1896, the vestry had no power to re-appoint the respondent except upon the terms of his original appointment, and secondly that the justices' warrant was invalid because it did not follow the terms of the vestry's resolution. It has been argued that this decision operates as an estoppel between the overseers of the parish for the time being and the respondent, and that it is impossible for the latter in any subsequent dispute with the former to say anything contrary to that decision. I do not take that view. There is no real dispute as to the law of estoppel between parties or privies. No question of fact which was directly in issue between the parties to the action before Bray J., and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray J., whether it

were a point of law or of mixed law and fact. But the reasons which led the learned judge to his decision upon the precise point do not bind the parties in a subsequent litigation. I need only refer to two cases in support of this view. In *Outram* v. *Morewood* (1) Lord Ellenborough C.J. said: "The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." To the same effect is a passage from *Ballantyne* v. *Mackinnon*. (2) A. L. Smith L.J. there said: "As to a judgment being only conclusive as to the point decided, there is as to this in our opinion no distinction between a judgment in rem and a judgment in personam, excepting that in the one 'the point' adjudicated upon (which in a judgment in rem is always as to the status of the res) is conclusive against all the world as to that status, whereas in the other 'the point,' whatever it may be, which is adjudicated upon, it not being as to the status of the res, is only conclusive between parties or privies." I need only add that the present appellants, as overseers of the poor for the time being of this parish, are as privies bound by the actual decision of Bray J.; but neither party is estopped by the reasons on which he based his decision.

The next attempt to raise the respondent's salary was at the vestry meeting held on September 19, 1912, where it was resolved unanimously that the respondent should "be paid the salary of 250*l*. per annum for performing the duties pertaining to the office of overseer of the poor save and except the making and collection of the poor rate and registration of parliamentary, county, and parochial electors." Following that there was a justices' warrant dated October 1, 1912, which recited in terms similar to those of the former warrant that the respondent "was on September 19, 1912, duly nominated and elected by the inhabitants of the parish of Eglwysilan then and there in

(1) 3 East, 346, 355. (2) [1896] 2 Q. B. 455, 462.

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vestry assembled to be assistant overseer of the said parish and the said inhabitants did then and there determine and specify the following duties . . . . and then and there did also fix the yearly salary of the said Thomas Jones to be 250*l.*" and so forth. That warrant is invalid as the former one was, and for similar reasons. However correct it may be to say that the inhabitants specified the duties of the respondent, to say that they nominated or elected him is not correct. The payment of the salary of 250*l.* was challenged. The district auditor allowed it. From this decision there was an appeal to the Local Government Board. Before deciding that appeal the Local Government Board issued an order dated October 18, 1915, amending a former order of June 2, 1896. Then on November 2, 1916, there was another meeting of the vestry at which the question of the respondent's salary was again raised. The notice convening the meeting stated that its object was "to consider the terms of the assistant overseer's salary and to pass such resolution or resolutions as may be necessary to give legal sanction thereto." At the meeting, after some discussion, it was ultimately resolved that the respondent should "be paid the salary of 250*l.* per annum for performing the duties pertaining to the office of overseer of the poor, save and except," as therein mentioned. Then followed the second warrant the validity of which is challenged. It recited that on November 2, 1916, the inhabitants of the parish in vestry assembled "did nominate and elect" the respondent. In truth they did nothing of the kind, and, that being so, the justices had no jurisdiction to appoint the respondent, who had not been nominated or elected by the inhabitants, and had not been presented to them after nomination or election.

This is enough to dispose of this appeal, and it is not necessary to decide any of the other points so elaborately argued; but as they may possibly affect the respondent's position I will shortly state my opinion upon them. The first is as to the validity of the orders of the Local Government Board dated October 18, 1915, and June 2, 1896. That depends upon the construction to be put on s. 33, sub-s. 4, of the Local Govern-

ment Act, 1894. Sub-s. 1 provides that the Local Government Board may, on the application of the council of any urban district, make an order conferring on that council, among other things, the appointment of assistant overseers. The Local Government Board on the application of the urban district council of Caerphilly made such an order transferring the power of appointment from the vestry to the council. By s. 33, sub-s. 4, of the Act the order is to make such provision as may seem necessary and just "for the preservation of the existing interests of paid officers." The question turns upon the meaning to be given to those words. On this point I take a view different from that of Bray J. and Lush J. In my opinion the words "existing interests" cover a wide field; they would include the prospect of an increased salary for increased duties. If that is right, the statute directs that provision shall be made for preserving not only the existing election of a paid officer but also the possibility of his re-election by the body who originally elected him. Article VI. of the order of June 2, 1896, was made with a view to preserving the existing interests of paid officers. Its meaning has been the subject of much discussion. Bray J. and Lush J. differ on the question. I prefer the view of Lush J. that the right to re-appoint an assistant overseer at an increased salary was not thereby transferred to the district council, and, there being no estoppel, it is open to the Court to adopt that view. In my opinion this article was within the power of the Local Government Board, and its effect is to reserve in the vestry the power of revoking the respondent's appointment and to provide that any re-appointment which may become necessary shall be by the vestry and justices, unless the respondent consents that the power of re-appointing him shall be conferred on the district council. The provision that "any such assistant overseer shall continue to hold office upon the same terms as at present" covers the period until he resigns or until his appointment is revoked, but in my opinion it does not intend, as Bray J. seems to have thought, that an assistant overseer must continue to hold his office upon the terms as fixed at the date of the order and that those terms

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can never be altered. If this view is correct the order of June 2, 1896, was intra vires.

Then it was argued that the order of October 18, 1915, was ultra vires because the Local Government Board, having once exercised their power under s. 33 of the Act, could not exercise it again. I am inclined to think that the argument of Mr. Upjohn upon this point is not sound, but the question is immaterial because the order of 1915 adds nothing to the order of 1896 and subtracts nothing from it. It is merely explanatory. If it is ultra vires, the earlier order stands; if it is intra vires, the earlier order is not affected.

It is not necessary to deal with Mr. Montgomery's argument as to the effect of s. 105 of the Poor Law Amendment Act, 1834, and the binding effect of the orders of the Local Government Board so long as they are not quashed by certiorari, but I agree with Lush J. in thinking that there is no foundation for the contention. As to the view expressed by Pollock C.B. in *Bamford* v. *Iles* (1) that the re-appointment of an officer on different terms operates as a revocation of his former appointment, the Chief Baron was speaking of a valid re-appointment. The cases he had in mind were valid re-appointments, because the nominations and elections were made every year. In my opinion the appeal succeeds.

WARRINGTON L.J. I am of the same opinion. The question is whether the respondent, as assistant overseer of the poor of a parish in Wales, is entitled to a salary of 250*l.* a year or to a salary of 85*l.* a year, the latter being, in the events which have happened, the salary attaching to his original appointment made in the year 1893. The answer to this question depends upon the answers to two further questions, which in their logical order are (1.) whether the resolutions increasing his salary were passed by the proper authority for that purpose, and (2.) whether that authority, in passing those resolutions, acted in accordance with, and under the powers conferred upon them by, the Poor Relief Act, 1819.

First, as to whether the vestry of the parish were the proper

(1) 3 Ex. 380.

authority to pass the resolutions. In my opinion they were, and if those resolutions had been properly passed, and if the warrants of the justices had been in conformity with them, the respondent would have been entitled to hold his position at the salary provided for by those resolutions and the warrants of the justices. The matter depends first on the construction and effect of the Local Government Act, 1894, and secondly on the construction of the Local Government Board's order of June 2, 1896. By way of introduction I would say that by the Poor Relief Act, 1819, there was given to the inhabitants in vestry assembled the power of nominating and electing an assistant overseer and of fixing his salary and his duties, and upon two justices was conferred the power of issuing a warrant, in pursuance of that nomination and election, appointing the person so elected assistant overseer at the salary and with the duties prescribed by the vestry. With that preface I turn to the Local Government Act, 1894. Sect. 33 of that Act provides that the Local Government Board may on the application of, amongst other bodies, the council of any urban district "make an order conferring on that council all or any of the following matters." One of those following matters is "the appointment of assistant overseers"; another is "the revocation of appointment of assistant overseers." Then it is provided by sub-s. 4 that the order "shall make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers." Now in my opinion the words "existing interests of paid officers" should not receive a narrow construction. Included in those "existing interests of paid officers" is the prospect that on termination of their office they may be re-appointed by the body which originally appointed them, and it was competent for the Local Government Board by their order to preserve that interest as well as the more concrete interests of the officer in question, such as the amount of his salary and the conditions of his appointment. Therefore in my opinion the order made by the Local Government Board on June 2, 1896, was within the powers conferred on the Board by the Act of 1894. The object of that order was to confer upon the councils of various

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urban districts the appointment and revocation of appointment of assistant overseers in pursuance of the powers conferred on the Board by s. 33—for some strange reason, the order does not follow the words of that section. Article I. says: "We hereby transfer to the urban district council . . . . the power of appointment, and, subject as mentioned in article VI., of revoking the appointment of any assistant overseer for each parish . . . ." Yet the Act says nothing about transferring those powers. "Conferring" is the word used.—There is nothing else material in the order until we come to article VI., which is intended to carry into effect the directions contained in sub-s. 4 of s. 33 as to making provision for the preservation of the existing interests of paid officers. Article VI. provides that "nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends . . . ." So far there is no difficulty. The power of revoking these appointments not having been conferred on the district council remains where it was, in the vestry. Article VI. goes on "nor, without his consent, to his re-appointment, and every such assistant overseer shall continue to hold office upon the same terms as at present." The effect of those words is to preserve to the vestry and justices the power of making any re-appointment, but, by the words "without his consent," to render valid any re-appointment made by the district council and accepted by the appointee. The power to re-appoint remains unaffected by the last words of the article providing that every assistant overseer "shall continue to hold office upon the same terms as at present," because the expression "re-appoint" assumes that there is a vacancy in the office to which the re-appointment is made, that the office has actually come to an end, and that it is necessary or desirable to make another appointment; and re-appointment does not imply that the person appointed is to hold the office on precisely the same terms as before; it merely implies that he has already held the office. It seems to me therefore, contrary to the view taken by Bray J., that the power of re-appointing an existing officer remained where it was notwithstanding the order of the

Local Government Board conferring the future appointment of such persons upon the district council. So far I am in favour of the respondent.

But then arises the second question, whether the vestry, being the authority having jurisdiction in the matter, exercised that jurisdiction in the way prescribed by the statute from which they derive it. [The Lord Justice read s. 7 of the Poor Relief Act, 1819, and proceeded:] Before the justices can issue their warrant there must be a nomination and election by the vestry of the person in question, and the salary must be fixed. Further, the appointment of the person with the salary and the duties attached to it is to continue until he resigns or until his appointment is revoked or expires by effluxion of time: see *Bamford* v. *Iles*. (1) If that is so, it is not competent for the vestry directly to increase the salary of the officer; in order to increase his salary they must re-nominate and re-elect him, and he cannot be re-nominated and re-elected until his office has determined either by his resignation, or by revocation of his appointment, or by its expiration by effluxion of time. This is not a matter merely of form or technicality; it is a matter of substance. The salary is payable out of public moneys, and in my view the statute intended that there should be no increase of salary except upon a vacancy in the appointment which should give to any inhabitant of the parish the power of proposing in the place of the existing officer some other discreet person willing to accept the appointment at the existing or at a smaller salary. Then did the vestry and the justices conform with the directions of the statute in their attempts to increase the respondent's salary? As to the attempt made in 1905 it is only necessary to say that the judgment of Bray J. in the former action is conclusive against the respondent to this extent, that the resolution of the vestry in September, 1905, and the warrant of the justices in August, 1906, were not effectual to increase his salary. That was the precise point decided in that action, and that point he is estopped from disputing; he does not indeed dispute it in this action. The reasons for the decision and the grounds on

(1) 3 Ex. 380.

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which it was based are not binding upon him. I need not refer to the authorities. I agree with what Bankes L.J. has said about them.

Two further attempts were made, the first in 1912 and the second in 1915. In 1912 there was no resignation and no revocation of the appointment. In view of the opinion I have expressed on the construction of the Poor Relief Act, 1819, the vestry on this occasion attempted to do that which the statute did not permit, namely, to increase the salary without making a fresh nomination and election. The justices appear to have noticed this defect, because in their warrant they recite that at the meeting of the vestry the respondent was nominated and elected; but that recital was contrary to the fact and cannot affect the validity or invalidity of the resolution itself. After this attempt it was thought that a further order of the Local Government Board might strengthen the position of the respondent, and in October, 1915, an order was made as to which I will say a word or two presently. Then in 1916 the vestry made their last attempt to increase the salary, but in face of a warning given them by a letter from the Local Government Board that the proper course was to revoke the respondent's appointment and then to re-elect him, they simply gave notice of a proposal to increase the salary and pass such resolutions as might give legal effect thereto, and then they acted exactly as they had acted before; they passed a resolution that the respondent should "be paid a salary of 250*l.* per annum." There may have been some reason why they were not willing either to revoke his appointment or induce him to resign and so create a vacancy and enable them to re-nominate and re-elect. However that may be, they did not do so. Again the justices, apparently observing the defect, recited, contrary to the fact, that the vestry had nominated and elected the respondent as assistant overseer, but again the terms of their warrant cannot alter the act of the vestry. Therefore, although the vestry had power to re-elect the respondent if they had chosen to do so, at an increased salary, they have not duly exercised the powers they possessed; their attempt was a nullity, and the only appointment the respondent holds

is the original appointment of 1893 at the yearly salary of 85*l.*

It only remains to say a word about the validity of the order of the Local Government Board made on October 18, 1915. It is not necessary to decide this point, but as the matter has been much discussed I had better state my opinion upon it. In my view that was not a valid order. It is immaterial, because in the view I take of the order of 1896 it was unnecessary to rely upon the order of 1915; but it seems to me that when such provisions as seem necessary and just for the preservation of the existing interests of paid officers have been made, all that is prescribed by s. 33, sub-s. 4, of the Act of 1894 has been done, and thereafter it is not competent for the Local Government Board to make any further provision for those interests. As to the contention that the order of 1915 must stand until it is quashed by certiorari I have nothing to add to what has been said by Bankes L.J.

In the result I agree with some regret that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Wrentmore & Son*, for *Spickett & Sons, Pontypridd.*

Solicitors for respondent: *Smith, Rundell, Dods & Bockett*, for *Morgan, Bruce & Nicholas, Pontypridd.*

W. H. G.

K. B. D.
1918
Nov. 4.

C. A.
Dec. 6.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

In re PEARCE.

Ex parte THE OFFICIAL RECEIVER, THE TRUSTEE.

Bankruptcy—"Secured Creditor"—Judgment Creditor—Equitable Execution—Appointment of Receiver—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 7, *sub-ss.* 1, 2; *ss.* 40, 167.

A debtor was adjudicated bankrupt on May 8, 1918, upon an act of bankruptcy committed on January 25, 1918. On September 4 and October 5, 1915, two creditors had obtained judgment against him in actions respectively brought for money lent. On December 23, 1915, an order was made in both actions appointing a receiver of the debtor's interest in an hotel of which he was lessee, and the furniture and effects therein and the business and goodwill thereof. Under the order the receiver was to apply the profits received by him in carrying on the business through the existing manager, in making certain specified payments, and "(*e*) in making such further payments as may hereafter be directed"; and the receiver was to "retain the balance of the said profits to be applied in discharge of the debts and costs due to the plaintiffs as and when may be hereafter ordered." On March 22, 1916, a further order was made varying the previous order in certain respects, and directing that the receiver should be at liberty to accumulate the balance of profits to form a fund out of which the judgment creditors might be paid their debts and costs. The receiver received profits of the business, and after making the payments directed by the orders, paid the balance into court. Upon a motion in the bankruptcy Horridge J. held that, as to so much of the fund as was received by the receiver before he had notice of the act of bankruptcy, the plaintiff was a secured creditor within s. 167 of the Bankruptcy Act, 1914:—

Held, by the Court of Appeal, reversing the decision of Horridge J., that the orders of December 23, 1915, and March 22, 1916, did not constitute the plaintiffs secured creditors. They did not direct that the sums received by the receiver should be paid and applied in satisfaction of the judgment creditors' debts. Nor did they create in favour of the creditors a "mortgage charge or lien on the property of the debtor as a security for a debt" due to them respectively from the debtor within s. 167. Under the orders the fund was to be held at the disposal of the court, which had full discretion over it, and before any order was made giving the execution creditors any right to any part of it, bankruptcy had supervened. The fund in court, therefore, belonged to the trustee in bankruptcy and not to the judgment creditors.

Levasseur v. *Mason & Barry* [1891] 2 Q. B. 73 distinguished.

MOTION on behalf of the Official Receiver for a declaration

that the Official Receiver, as trustee of the property of the debtor, was entitled to the sum of 679*l.* 19*s.* 1*d.*, paid into court in the actions of *Pearce* v. *Pearce* and *Jones* v. *Pearce*, and that the said sum might be paid out to him as such trustee.

On September 4, 1915, one Isabel Pearce, a respondent to the motion, recovered judgment against the debtor for 616*l.* 14*s.* and 4*l.* 14*s.* costs for money lent, and on October 5, 1915, Annie Slade Jones, the other respondent to the motion, recovered judgment against the debtor for 641*l.* 13*s.* 2*d.* and 4*l.* 14*s.* costs also for money lent.

On December 23, 1915, an order was made in both actions by which a receiver was appointed to receive, inter alia, the debtor's interest in an hotel called the Opera Hotel of which he was lessee, and the furniture and effects therein and the business and goodwill thereof. Under the order the receiver was to apply the profits received by him in carrying on the business through the existing manager, in making certain specified payments, and "(*e*) in making such further payments as may hereafter be directed"; and the order provided "that the receiver do retain the balance of the said profits, to be applied in discharge of the debt and costs due to the plaintiffs as and when may be hereafter ordered."

On March 22, 1916, by a further order made in both actions, the order of December 23, 1915, was varied by extending the appointment of the receiver, so as to appoint him receiver of the furniture and goods at a flat of which the debtor was tenant, and after authorizing the receiver to make certain payments out of his receipts, and giving him certain directions, the order provided "that the receiver be at liberty to accumulate the balance of the said profits, to form a fund out of which the judgment creditors may be paid their debts and costs."

On February 1, 1918, the receiver received notice of an act of bankruptcy committed by the debtor on January 25, 1918, upon which he was subsequently adjudged bankrupt.

On March 12, 1918, a receiving order was made against the debtor, who was adjudicated a bankrupt on May 8, 1918.

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No trustee having been appointed by the creditors the Official Receiver became the trustee of the property of the debtor.

On July 11, 1918, an order was made in both actions, by which the receiver was, inter alia, directed "to pass his final account, and to pay into court in the above-mentioned actions the balance in his hands, as shown by such account, the amount so paid into court to abide further order, and not to be paid out without notice to the Official Receiver. This order and the payment into court to be without prejudice to the right of any party, including the Official Receiver." The balance due from the receiver was duly certified, and he subsequently paid into court the sum of 679*l.* 19*s.* 1*d.*, the amount now claimed by the Official Receiver as trustee of the property of the debtor.

E. W. Hansell for the trustee. The trustee is clearly entitled to all money received by the receiver appointed in the actions after February 1, 1918, the date on which he received notice of the act of bankruptcy committed by the debtor.

The trustee is also entitled to the money received by the receiver before he received notice of the act of bankruptcy. The respondents are not secured creditors under the orders: *In re Dickinson.* (1) The holding of the money by the receiver did not constitute possession of it by the respondents. The receiver was merely the officer of the Court. The orders merely provide that the receiver is to collect a fund of money. He is not in any sense the agent of the respondents. There was no direction in the orders to the receiver to pay the respondents. A garnishee order does not make a plaintiff a secured creditor unless there has been actual payment under it: *Butler* v. *Wearing* (2); *In re Trehearne.* (3) The position of the respondents is the same as if a writ of *fi. fa.* had been issued, but not executed. The respondents were not secured creditors within the meaning of ss. 7, 40, and 167 of the Bankruptcy Act, 1914. [*In re Potts* (4) and *In re Gershon and Levy* (5) were also referred to.]

(1) (1888) 22 Q. B. D. 187.
(2) (1885) 17 Q. B. D. 182.
(3) (1890) 7 Morr. 261; 60 L. J. (Q. B.) 50.
(4) [1893] 1 Q. B. 648.
(5) [1915] 2 K. B. 527.

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Pattisson for the respondents. The effect of the orders was that the respondents were entitled to an actual charge on the money which came into the hands of the receiver. It must be admitted on behalf of the respondents that they have no legal claim to the money received by the receiver after February 1, 1918, the date on which he received notice of the act of bankruptcy, but they are entitled to all money received by him before that date. The balance of the profits in his hands made a fund out of which the judgment debts of the debtor were to be paid, and the money could not be paid to any other persons. The receiver had to retain it for that specific purpose. It was earmarked as belonging to the respondents. *In re Potts* (1) and *In re Gershon and Levy* (2) show that the respondents are secured creditors. The orders gave an equitable charge on the money coming into the hands of the receiver in favour of the respondents, as it was subject to a direction that it was to be accumulated for the respondents.

E. W. Hansell in reply. It is true that *In re Potts* (1) shows that where money is in the hands of a third party, and notice is given to him not to pay his creditor, an equitable charge is constituted on the money; but in the present case the orders do not contain any words showing that the money shall stand charged. In *In re Gershon and Levy* (2) there was an order to pay directly out of the partnership assets. When money is being collected by an officer of the Court a creditor cannot be a secured creditor until he has been paid the money. In the present case the receiver was merely to accumulate the money, and to pay it in discharge of the debts as and when he might be ordered to do so. He was merely to hold the fund. The direction was to accumulate —not to pay.

HORRIDGE J. This case raises rather a difficult point, and one that appears not to be exactly covered by authority. [The learned judge stated the facts, and continued:] On February 1, 1918, when the receiver appointed in the two

(1) [1893] 1 Q. B. 648. (2) [1915] 2 K. B. 527.

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actions received notice of the act of bankruptcy committed by the debtor on January 25, 1918, he had in his hands certain moneys, and my judgment is based on the assumption that the bulk of those moneys had been received by him before he received notice of the act of bankruptcy. As to the moneys received by him subsequently to his receiving notice of the act of bankruptcy, it has not been contended—in my opinion rightly—that they stand on the same footing as the moneys received before notice of the act of bankruptcy. As regards those moneys subsequently received, it is quite clear that the trustee is entitled to them, and that his motion must succeed so far as they are concerned.

The real question which arises with regard to the bulk of the moneys received is whether moneys standing in the hands of the receiver at the date of the receiving order belong to the respondents, the plaintiffs, in the two actions, or to the trustee, and form a portion of the property of the bankrupt.

By s. 7, sub-s. 1, of the Bankruptcy Act, 1914, on the making of a receiving order, the Official Receiver is thereby constituted receiver of the property of the debtor, but by sub-s. 2 the section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize it if the section had not been passed. Sect. 167 defines "secured creditor" as meaning "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." Sect. 40 deals with forms of execution, including one by the sheriff, where an execution has been issued, and another where a debt has been attached. I do not think that either of those forms of execution is the same as that which has been adopted in the present case. In my view, the appointment of the receiver is not an attachment of the debt within the meaning of s. 40. I have, therefore, to consider whether the orders made in the present case place the respondents in the position of secured creditors; that is to say, persons holding a mortgage charge or lien on the property of the debtor. Two cases have

been mainly relied upon. The first was *In re Dickinson* (1), where the judgment creditors had obtained an order appointing a receiver to receive "the stock-in-trade and other property and effects belonging to" the judgment debtor, without prejudice to certain rights, all further questions being reserved until the further order of the Court, and it was held that the possession of the receiver was the possession of the Court, and that on that form of order no charge was created in favour of the execution creditors. And if the orders in the present case had been in a similar form, I should have been bound by that decision to hold that they gave no charge upon the funds in the hands of the receiver.

The second case mainly relied upon was *In re Potts.* (2) In that case the order did go on to direct the mode in which the moneys coming to the receiver were to be dealt with by him, because he was to "pay the balance or balances appearing due on the accounts left, or such part thereof as shall be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what shall, for the time being, be due in respect of the judgment." Directions were given as to the payment of costs, and it was ordered that the balance, if any, remaining in the hands of the receiver, after making the several payments before directed, should forthwith be paid by him into Court to the credit of the action, subject to further order. That is to say, what he paid into Court was to be paid after providing for the judgment which was to be paid. But the order, which appointed a receiver of a certain beneficial interest in the estate of the bankrupt's deceased mother, contained no direction which affected the trustees of her will. It was obtained ex parte, and in the absence of the persons who would have to pay the money, and as I read the judgments of Vaughan Williams J. and of the Court of Appeal that was the point upon which the case turned. It was decided that the order created no charge, because it was obtained ex parte, and gave no valid directions affecting the trustees, binding them as to how they should dispose of the estate

(1) 22 Q. B. D. 187. (2) [1893] 1 Q. B. 648.

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in which they were interested. But it appears to me that the order in the present case of December 23, 1915, directs that the receiver is to retain the balance of the profits to be applied in discharge of the debt and costs due to the plaintiffs. It is quite true that it goes on to say "as and when may be hereafter ordered," but that is the mode in which the payment is to be applied for the benefit of the plaintiffs, and a further order could, so long as the order of December 23, 1915, stood, only direct it to be paid in some way to the plaintiffs, and not to any other person. The order of March 22, 1916, which extended the assets to be received, contained a clause providing that the receiver was to be at liberty to accumulate the balance of the profits to form a fund "out of which the judgment creditors may be paid their debt and costs." Now, do those two orders direct the receiver to hold these funds in favour of the plaintiffs? If they do, in my judgment they created a charge upon the moneys in his hands in favour of the respondents. I think they come within the words used by Lord Esher M.R. in giving judgment in *In re Potts* (1), where he said: "An order appointing a receiver can only amount to a charge if it charges the person in whose hands the money is not to deal with it except in one way." The order of December 23, 1915, directs the receiver not to deal with the balance in his hands, except for the benefit of the plaintiffs as ordered by the Court; or, to use the actual words of the order, "in discharge of the debt and costs due to the plaintiffs." In my view, therefore, there was a valid charge created upon the moneys when they came into the hands of the receiver. I think the same point is involved as that which I decided in *In re Gershon and Levy* (2), where Joyce J. had directed that the solicitors' costs should be paid out of the moneys in the hands of the receiver; and I said, dealing with that point: "Here, however, I find that Joyce J. has made an order directing the receiver to pay these costs when taxed out of the moneys in his hands, and that I think created an equitable charge." I therefore think a charge was created.

(1) [1893] 1 Q. B. 648, 659. (2) [1915] 2 K. B. 527, 532.

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On behalf of the trustee it is contended that Vaughan Williams J. used language in *In re Potts* (1) which is in conflict with the decision at which I have arrived, and amounts, in effect, to a decision that no order of the Court can create a charge upon moneys in the hands of the receiver until those moneys are handed by the receiver over to the person claiming to have the charge. In my opinion the learned judge did not intend to lay down that proposition. It was not the question he had to decide, and he was dealing with a form of order which used to be frequent in the old days when the aid of the Court of Chancery had to be invoked in order to enforce judgment by way of equitable execution, because he said: "In the old days, when proceedings had to be taken in equity to get rid of a legal impediment, a Court of Equity, as I understand, would never have allowed the property, which was in the hands of the law, to be disposed of by the execution debtor in a way inconsistent with the rights of the plaintiff in that procedure. But that is a very different thing from saying that the plaintiff had any property in the goods or any lien upon the goods which were in the hands of the receiver." The meaning of those words is that, by the mere appointment of a receiver by a Court of Equity, the Court did not create a charge, although it would not allow the property to be used in any other way than for the benefit of the plaintiff. He continued: "The real fact is, that the property which is in the hands of the receiver is held by the Court in medio until the rights of the plaintiff (as it would have been in the old proceeding) have been determined." I think he was referring to the case where a receiver is appointed without directions to apply the money specifically for purposes of the plaintiff or for the execution creditors, and if his language is read in that light, the principle it lays down is obviously sound. If a receiver is merely appointed as an officer of the Court to collect, without directions as to how to apply, and the moneys in his hands are subject to a further order of the Court, the plaintiff gets no charge at all. It is with regard to that position that he went on to

(1) [1893] 1 Q. B. 648, 652, 653

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say: "But until that has been done, and the proceeds of the sale of the property by the receiver have been handed over by him to the person who obtained the order, in my judgment he acquires no property in, no lien, and no charge whatever on that which is the subject-matter of the order." I think that has to be taken in reference to the case where the order appoints the receiver, but does not give any specific charge upon the fund or directions as to how he is to apply them, and where the fund is subject to the further order of the Court. I entirely agree with everything that the learned judge said. Lord Esher M.R. said (1): "An order appointing a receiver can only amount to a charge if it charges the person in whose hands the money is not to deal with it except in one way." In the present case I think the orders have charged the money in the hands of the receiver to be dealt with in one way, and one way only, for the benefit of the respondents, and that therefore I ought to make a declaration that the trustee is not entitled to the moneys which were in the hands of the receiver on February 1, 1918, the date when the receiver had notice of the act of bankruptcy, but that he is entitled to all moneys subsequently received.

Declaration accordingly.

J. E. A.

The Official Receiver appealed from so much of the order of Horridge J. as determined that the sums received by the receiver in the actions before he had notice of the act of bankruptcy belonged to the plaintiffs. There was no appeal by the plaintiffs from the rest of the order.

Clayton K.C. and *E. W. Hansell* for the appellant.

Cunliffe K.C. and *Pattisson* for the respondents.

[The arguments used in the Court below were substantially repeated. *In re Marquis of Anglesey* (2) and *Levasseur* v. *Mason & Barry* (3) were also referred to.]

SWINFEN EADY M.R. stated the facts, and, referring to the order of December 23, 1915, said that the Court reserved

(1) [1893] 1 Q. B. 659. (2) [1903] 2 Ch. 727.
(3) [1891] 2 Q. B. 73.

full power to make any payment out of the moneys received by the receiver, and obviously the Court taking the receipts from carrying on the business, would see that any debts, properly incurred in carrying on the business, were paid out of the proceeds. It was not an order directing that the sum received by the receiver be paid and applied in satisfaction of the judgment creditors' debts.

The order of March 22, 1916, did not carry the matter further: it only dealt with the balance which the receiver was to be at liberty to accumulate.

The MASTER OF THE ROLLS, continuing, said: The question is, bankruptcy having supervened, were the plaintiffs secured creditors in respect of this fund? The Bankruptcy Act, 1914, by s. 167 defines a secured creditor as follows: "A secured creditor means a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." Had the plaintiffs a mortgage charge or lien on this property? The law with regard to the effect of orders appointing receivers was dealt with by the Court of Appeal in *In re Dickinson* (1) and again in *In re Potts.* (2) Counsel for the plaintiffs said that he had to satisfy this Court that the order, if it was to amount to a charge, must come within Lord Esher's expression in *In re Potts:* (3) "An order appointing a receiver can only amount to a charge if it charges the person in whose hands the money is not to deal with it except in one way." That must mean "except to pay it to, or hold it for, the execution creditor." In this case it does not come to anything of the sort; it comes nowhere near it. The effect of the order is simply that the whole fund is to be held at the disposal of the Court: it is liable to have paid out of it such further payments as may thereafter be directed by the Court before there is any question of any balance being dealt with at all. I think it is quite manifest that the orders do not amount to any positive direction either ordering payment to the execution creditors or ordering the fund to be held for the

(1) 22 Q. B. D. 187. (2) [1893] 1 Q. B. 648
(3) Ibid. 659.

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execution creditors or restricting its being dealt with except by being paid to, or held for, the benefit of the execution creditors. Their effect is exactly the opposite. The Court has full discretion over the fund, and before any order has been made giving the execution creditors any right to any part of it bankruptcy has supervened. With regard to *Levasseur* v. *Mason & Barry* (1), it is enough to say that in that case there was no question of an English bankruptcy as in the case we have to deal with. I do not understand that it was even suggested that the plaintiffs had any claim as execution creditors under s. 40 of the Bankruptcy Act, but it was manifest they had not.

For these reasons I am of opinion that the order made by Horridge J., so far as it is appealed from, is erroneous, and that the fund in question belongs to, and ought to be ordered to be paid to, the Trustee in Bankruptcy.

DUKE L.J. I am of the same opinion. If this order be examined in the light of the law with regard to the process of equitable execution, I do not think it can be contended that there was here any such process. Counsel for the respondents said that he had not had an opportunity of ascertaining whether there existed any precedent for holding that the orders in question here amounted to a process of execution of this kind, but to my mind the observations of Davey L.J. in *Cadogan* v. *Lyric Theatre, Ltd.* (2), which followed an examination of the authorities, and of Lindley L.J. in *Holmes* v. *Millage* (3), show that no process of equitable execution could properly be granted which should have the effect sought now to be given to the orders which have been made here. When the orders are examined it is clear that the fund was not thereby in any sense finally appropriated to the use of the plaintiffs. There still remained stages to be passed before it could be ascertained whether this fund would become the money of the plaintiffs or not. In view of those circumstances the proof given by the respondents is far short of what was

(1) [1901] 2 Q. B. 73. (2) [1894] 3 Ch. 338, 344.
(3) [1893] 1 Q. B. 551, 555.

shown, in the cases to which my Lord has referred, to be necessary if the claim to be treated as secured creditors is to be established in a case of this kind.

EVE J. I am of the same opinion. The question is what interest the execution creditors had on February 1, 1918, in the moneys in the hands of the receiver. That depends on the true construction of the orders of December 23, 1915, and March 22, 1916. These orders did not, in my opinion, confer on the judgment creditors any equitable interest in the moneys as distinguished from a right to get them by a process not yet completed. Until that process is completed by an order for payment the moneys are held by the receiver in medio between the parties, and as the debtor has become bankrupt, and the title of his trustee has supervened before there has been any order for payment, the title of the trustee must prevail.

Appeal allowed.

Solicitors for trustee: *Tarry, Sherlock & King.*
Solicitors for respondents: *Corbin, Greener & Cook.*

G. A. S.

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[IN THE COURT OF APPEAL.]

TURPIN *v.* VICTORIA PALACE, LIMITED.

[1917 T. 812.]

Application for a new trial dismissed.

THIS action was tried before McCardie J. and a common jury. The plaintiff, a music hall artiste, claimed damages for a breach of contract by the defendants in wrongfully determining her engagement, and was awarded damages. A point of law as to the measure of damages was decided by the learned judge, and is reported [1918] 2 K. B. 539. Upon that point there was no appeal.

The learned judge put certain questions to the jury, who answered them in favour of the plaintiff, and found a verdict upon this part of the case for 100*l*. The defendants moved for a new trial on the grounds that the verdict was against the weight of the evidence, and that these damages were excessive.

McCall K.C. and *W. R. L. Trickett* (for *Gilbert Beyfus*, serving with His Majesty's Forces) for the defendants.

J. B. Matthews K.C. and *E. Lionel Benson* (*E. F. Lever* with them) for the plaintiff.

The Court (Bankes, Warrington, and Scrutton L.JJ.), without calling upon counsel for the plaintiff, dismissed the application.

Solicitors for defendants: *Beyfus & Beyfus.*
Solicitors for plaintiff: *Bevan & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

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Dec. 9.

NORTH STAFFORDSHIRE RAILWAY COMPANY *v.* EDGE.

[1917 N. 349.]

Railway — Rates — Increase — Inequality of Charge — Compromise — Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.

By s. 90 of the Railways Clauses Consolidation Act, 1845, it is lawful for a railway company to alter their tolls, provided that all such tolls be at all times charged equally to all persons, and after the same rate in respect of all goods of the same description and conveyed by a like carriage passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person using the railway.

A railway company from June 30, 1913, onwards increased the rates for carriage of coal and coke to places beyond their railway. A number of colliery owners objected to the increased rates and took proceedings to challenge them. These proceedings were compromised by an agreement whereby (1.) for traffic after December 31, 1915, the colliery owners were to pay a rate of ½*d.* per ton above the original rate on all coal and coke they should send from their collieries to places beyond the railway; (2.) for traffic from July 1, 1913, to January 1, 1916, the colliery owners were to pay a rate of ½*d.* per ton above the original rate on all coal and coke they had sent carriage paid by them to places beyond the railway. These payments were to be in satisfaction of the increased rates and of increased charges for services at the private sidings of the colliery owners. The rates specified in the agreement were less than the increased rates. The railway company also agreed to repay to two of the colliery owners amounts which had been paid by them in excess of the amounts specified in the agreement.

A coal merchant who sent coal and coke carriage paid from the collieries of the owners to places beyond the railway, and who was no party to the agreement, had also objected to and refused to pay the increased rates. The railway company sued him for the full amount of the increase:—

Held, that the increased rate was not charged equally to all persons under the same circumstances, and was not authorized by s. 90 of the Act; that the inequality was not justifiable merely as being due to a compromise; and that the plaintiffs could recover no more than was being charged to the colliery owners under the agreement.

APPEAL from the judgment of Rowlatt J.

The plaintiffs were a railway company who carried large quantities of coal and coke from collieries in North Staffordshire

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over their railway and to places beyond it. Soon after the passing of the Railway and Canal Traffic Act, 1913 (2 & 3 Geo. 5, c. 29), they took the necessary steps to increase as from June 30 of that year the rates charged for this traffic. A large number of colliery companies and proprietors in North Staffordshire, including the Fenton Collieries, Limited, and Settle, Speakman & Company, Limited, and twenty-two other companies, disputed the right of the plaintiffs to charge the increased rate. The Fenton Collieries, Limited, and Settle, Speakman & Co. paid the increased rate under protest, but the other companies refused to pay anything beyond the old rate. These and the two who had paid under protest formed themselves into the North Staffordshire Colliery Owners' Association, and in 1916, when the unpaid claims of the plaintiffs had reached a considerable amount, applications were made by the association and by other large traders to the Railway and Canal Commissioners for the purpose of challenging the plaintiffs' right to impose the increased charges. In the end the other traders withdrew their application, and the application of the North Staffordshire Colliery Owners' Association was settled upon the terms of an agreement dated February 11, 1916, and made between the plaintiffs of the one part and the association of the other part, which contained the following material clauses :—

"In order to prevent litigation with respect to the said increases of rates on coal and coke it is agreed without prejudice to the legal rights and liabilities of either party that in consideration of the colliery owners paying to the railway company subject to the maximum rates for conveyance authorized by their Rates and Charges Order Confirmation Act, 1892, as from January 1, 1916, and during the continuance of this agreement the sum of ½d. per ton on all coal and coke they dispatch from their respective collieries to all places situated beyond the North Staffordshire Railway in addition to the payments at the rates in force on June 30, 1913, the railway company will accept the said additional payments in satisfaction of all claims for increases in the rates of conveyance during the continuance of this agreement on all the

coal and coke dispatched from the said collieries whether the rates are payable by the consignor or the consignee.

"The railway company agrees that the said payments shall also be accepted in satisfaction of all claims for new charges or increase on the charges made at June 30, 1913, to any of the parties hereto or others for services rendered or alleged to be rendered on coal and coke traffic at the private sidings of the said collieries.

"And it is also agreed that in respect of the period from July 1, 1913, to December 31, 1915, both dates inclusive, the colliery owners will (subject to the maximum rates as aforesaid) pay to the railway company the sum of $\frac{1}{8}$d. per ton on all coal and coke which the colliery owners dispatched from their respective collieries carriage paid by them to all places situate beyond the North Staffordshire Railway (such payment to be in addition to the proper charges at the rates in force at June 30, 1913) in satisfaction of all claims for increase of rates or new or increased charges at the private sidings of the said collieries in respect of all coal and coke traffic from such collieries the carriage on which has been paid or is payable by the colliery owners.

"The railway company also agree to repay to Settle, Speakman & Company, Limited, and the Fenton Collieries, Limited, respectively the amount of increases of rates or charges paid by them respectively in excess of the amounts hereinbefore agreed to be paid.

"This agreement shall remain in force for two years from January 1, 1916 (six months' previous notice in writing to be given if it is intended to be terminated at the end of the said two years), and thereafter until terminated by either party giving to the other six months' notice in writing to terminate the agreement to expire on December 31 in any year. Provided" &c.

The plaintiffs admitted that this agreement had been duly carried out, and that in accordance with its terms they had received the $\frac{1}{2}$d. and $\frac{1}{8}$d. per ton, and had repaid to Settle, Speakman & Co. and the Fenton Collieries, Limited, the amounts to be repaid to them.

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The defendant was a colliery agent and factor carrying on business in Manchester. He bought coal and coke at various collieries in North Staffordshire which he consigned to places beyond the plaintiffs' railway system. The plaintiffs carried large quantities of coal and coke for the defendant, and by agreement between them a monthly credit account was opened upon the terms that the amount shown due in each account should be paid in full before the close of the month following and that errors should be allowed in a subsequent month's account, but while under discussion should form no ground for delay in settling the accounts. The defendant was to be subject in all matters connected with the transmission of goods to the established regulations of the plaintiffs as to the conditions of carriage and charges from time to time in existence.

The defendant, like the colliery owners above mentioned, objected to the increased rates charged by the plaintiffs, and refused to pay them. During the period from July 1, 1913, to January 1, 1916, he deducted from the amounts claimed in the monthly accounts rendered to him so much as represented the increase and paid only the amount of the original rates. At the date of the writ in this action the sums so deducted amounted to 643*l.* 0*s.* 5*d.*, and this sum the plaintiffs claimed.

The defendant was not a party to the agreement of February 11, 1916. As regards coal and coke carried by the plaintiffs between July 1, 1913, and January 1, 1916, the effect of that agreement was that in certain instances for the same services between the same points and on the same goods the colliery owners who were parties to the agreement paid $\frac{1}{8}$d. per ton only in addition to the original rates, while the defendant was being charged the full increased rate, which was much more than $\frac{1}{8}$d. per ton above the original rate. The defendant contended that this being so the increased rates, in so far as they exceeded $\frac{1}{8}$d. per ton, were contrary to s. 90 of the Railways Clauses Consolidation Act, 1845 (1),

(1) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90: "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not

and void. Alternatively, he paid 110*l.* into Court denying liability.

Rowlatt J. held that the defendant could not lawfully be charged more than $\frac{1}{8}$d. per ton above the original rate, inasmuch as any higher charge was not charged equally to all persons, and so was forbidden by s. 90 of the Act. He held that the plaintiffs were entitled to charge the defendant an increased rate of $\frac{1}{8}$d. per ton, which resulted in a sum of 65*l.* 12*s.* 6*d.* Judgment was therefore given for the defendant.

The plaintiffs appealed.

Macmorran K.C. and *W. E. Vernon* for the appellants. There is no inequality of charge here. The respondent and all colliery owners and traders sending coal and coke by the appellants' railway were equally charged with the increased rates from and after June 30, 1913. Some of the parties charged paid the increased rates; others, including the respondent, paid the original rates but refused to pay the increase; but all were charged alike. When these colliery owners and traders had become largely indebted to the appellants for rates thus withheld, proceedings were taken before the Railway and Canal Commissioners to question the validity of the increase. The appellants insisted that the increase was justified on two grounds, first on account of the increased wages they had to pay, and secondly on account of various services rendered by them at private sidings.

be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

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Thereupon one large trading firm withdrew from the litigation. With the other litigants, namely the twenty-four firms constituting the North Staffordshire Colliery Owners' Association, the compromise of February 11, 1916, was effected. That settlement dealt with a number of matters besides the increased rate. The position of these owners and the position of the respondent are not one and the same. To clear off their outstanding debt the owners agree to make, and, in view of the particular relations and of special stipulations between the parties, the appellants agree to accept, certain payments. To clear off his outstanding debt the respondent, who does not share in those relations and has no special agreement with the appellants, pays in full. This is in no sense to charge an unequal rate or toll. The learned judge has confused the rates charged with the means of recovering or liquidating the amounts charged but unpaid. The charge is the same in all cases, though the means used to liquidate it may vary. If one trader becomes insolvent and cannot pay the charge the railway company is not bound to accept only a dividend from all the solvent traders who can but will not pay. If a particular trader has a large counterclaim against the railway company, may not the latter accept a percentage of the charge without affecting their rights against other traders ?

Talbot K.C. and *A. T. Miller* for the respondent. The question in this appeal is whether the $\frac{1}{8}$d. per ton on coal and coke dispatched carriage paid by the colliery owners from their respective collieries to places beyond the North Staffordshire railway is a toll. It plainly is. If so, the fact that it forms part of a compromise is immaterial. The effect of the agreement of February 11, 1916, is that the colliery owners are being charged a toll which is lower than the increased toll with which the respondent is being charged for goods of the same description, conveyed and propelled by like carriages and engines passing over the same portion of the appellants' line under the same circumstances. This is contrary to s. 90 of the Railways Clauses Consolidation Act, 1845. The increased toll is not being charged equally to all persons. Inequality of charge is forbidden by s. 90 of the Railways

Clauses Consolidation Act, 1845, which is a rigid and inelastic enactment: *London and North-Western Ry. Co.* v. *Evershed* (1); *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2); *Phipps* v. *London and North-Western Ry. Co.* (3) The inequality is not justified by being the outcome of a compromise. The result is that nothing in excess of $\frac{1}{8}$d. per ton can be recovered from the respondent.

Macmorran K.C. in reply.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered:—

BANKES L.J. This is an appeal from a judgment of Rowlatt J. The question for decision depends upon what, having regard to the circumstances under which it was made, and the provisions of s. 90 of the Railways Clauses Consolidation Act, 1845, is the true effect of an agreement made on February 11, 1916, between the appellants and the North Staffordshire Colliery Owners' Association acting on behalf of a number of colliery companies and traders. The facts are not really in dispute. In May, 1913, the appellants increased the rates charged by them for the carriage of coal and coke as from July 1 of that year. A number of traders, including the respondent, refused to acknowledge the appellants' right to raise the rates, upon the ground that the rise was not justified by the increased cost of working and was not within the protection of the Railway and Canal Traffic Act, 1913. The appellants disputed this contention, and we were told that applications were made to the Railway Commissioners by Messrs. Brunner, Mond & Co. and by the North Staffordshire Colliery Owners' Association to decide the dispute. As a result of investigations into the increased costs of working, Messrs. Brunner, Mond & Co.'s application was withdrawn and the dispute with the North Staffordshire Colliery Owners' Association was compromised by the agreement of February 11, 1916.

The respondent, who had considerable quantities of coal and

(1) (1878) 3 App. Cas. 1029. (2) (1885) 11 App. Cas. 97.
(3) [1892] 2 Q. B. 229.

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coke carried for him by the appellants, had a monthly account with them in which he was charged at the increased rates. The respondent every month deducted the difference between the old rate and the increased rate, and for the period between July, 1913, and December, 1915, these deductions amounted to a considerable sum. It was for this sum that the present action was brought. The only defence which need be noticed was that for the aforesaid period the appellants had charged the various colliery companies and firms, for whose benefit the agreement of February 11, 1916, was made, a lower rate than that charged to the respondent, and under circumstances which constituted an infringement of the provisions of s. 90 of the Railways Clauses Consolidation Act, 1845, and that as a consequence the appellants were not entitled to recover any portion of their claim.

The section provides that all tolls charged by a railway company are to be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all goods of the same description and conveyed by a like carriage, passing only over the same portion of the line of railway under the same circumstances, and that no reduction in any such tolls shall be made either directly or indirectly in favour of any particular person using the railway.

Mr. Macmorran sought to establish the proposition that the section had no application to the present case upon the ground that it related to tolls only and not to through rates, and also upon the ground that the circumstances under which the alleged overcharge was made were not the same. Neither point appears to have been insisted upon in the Court below, and it is sufficient to say with regard to both points that the evidence necessary to enable either point to be taken successfully is not before the Court. I therefore express no opinion on these questions of law which Mr. Macmorran suggested. The case must be decided upon the footing that s. 90 does apply, and the question in dispute between the parties depends entirely in my opinion upon whether the true effect of the agreement of February 11, 1916, was to substitute in favour of the parties to that agreement, over the period from July 1,

1913, to December 31, 1915, a new rate in place of the increased rate which had been made in May, 1913, to come into force on the following July 1. Rowlatt J. held that this was the effect of the agreement. In one part of his judgment he says: "The compromise merely resulted in agreeing what I may call a Schedule of Rates," and in another part, "It remains that they have fixed up a rate which so far as it includes the traffic with which Mr. Edge is concerned is an unequal rate as against him." It is necessary, I think, to look at the substance rather than at the form of the compromise. What the parties did was to make provision for the future as well as to deal with the past. So far as the future was concerned the agreement fixed for a period of at least two years from January 1, 1916, the rates which should be paid on all coal and coke which should be dispatched by the parties to the agreement from their respective collieries to all places situate beyond the North Staffordshire railway. In substance as well as in form this provision does, in my opinion, substitute for the period during which the agreement lasts another rate for the one published in May, 1913, and as a result of this anyone who can show that his case falls within the limitations imposed by s. 90 of the Act of 1845 and who is charged the increased rate, would be entitled to complain of an inequality of charge. An obvious distinction, however, exists between a case where a railway company by way of compromise fixes the rates which are payable in the future, and where by way of compromise they accept a less sum than the amount claimed in respect of rates for traffic already carried. In the latter case it is easy to put instances where it could not be contended that s. 90 of the Railways Clauses Consolidation Act had any application, as, for instance, where a railway company accept half their claim from a man who is obviously not in a position to pay more. A bona fide compromise which results in the payment of a less sum than the amount claimed may be so stated that it could not be brought within the section, even though the motive for accepting the lesser sum was not apparent. On the other hand it may be so stated that whatever the intention may have been, it does,

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in substance, substitute a lower rate for the one originally claimed. It is no doubt unfortunate for the appellants in the present case that they were in the one document dealing with a number of traders whose consignments of coal and coke must have differed in quantity over the period in question, and with traders some of whom had paid the increased rate, though most of them had refused to do so. As a matter of drafting it was almost a matter of necessity to express the allowances which the appellants were prepared to make in terms of a rate per ton. The effect of doing this, however, in my opinion was in this particular case in substance as well as in form to substitute over the period in question in the case of the parties to the agreement a lower rate than the increased rate, and therefore a lower rate than the one charged to the respondent. I am influenced in coming to this decision by the clause in the agreement of compromise which deals with the cases of Settle, Speakman & Co. and the Fenton Collieries, Ltd., who had apparently paid the increased rate in full. The provision for repayment of the amounts paid by them in excess of the amounts by the agreement agreed to be paid appears to me to bring the cases of these companies clearly within both the mischief and the language of the section. It is probably sufficient for the respondent's purpose to show that inequality of rate over the period in question existed as between himself and these two companies, but the agreement of compromise must, I think, have in substance the same effect with regard to all the other companies and firms as it has in my opinion with regard to these two. For the above reasons I think that the appeal fails and must be dismissed with costs.

WARRINGTON L.J. The question in this case is whether or not as the result of the agreement of February 11, 1916, the rates charged by the railway company for the carriage of coal and coke during the period from July 1, 1913, to December 31, 1915, are charged equally to all persons under the same circumstances. The defendant says they are not, and that he cannot be called upon to pay more than the increase of $\frac{1}{8}$d. per ton charged to the colliery owners under the agreement.

The learned judge has accepted this view and the railway company appeals.

The material facts are as follows: After the passing of the Railway and Canal Traffic Act of 1913, the appellants took the necessary steps to increase as from the end of June, 1913, the rates charged for the carriage of goods, including coal and coke, carried to places beyond the North Staffordshire railway. They demanded these increased rates from all persons alike, and that not colourably only but with a real intention of requiring payment. The right to charge the increased rate was disputed by the North Staffordshire Colliery Owners' Association comprising substantially all the owners in the district, and they raised a complaint in respect of such increase before the Railway and Canal Commissioners. The appellants defended their position up to a certain point, but ultimately made the agreement with the association on which the question arises. Meanwhile the respondent, who is a coal merchant or factor buying coal at the collieries and consigning it to places beyond the North Staffordshire railway, had, in paying his monthly accounts for carriage of his coal, retained the amount of the increase of rates and paid the old rates only. This action was brought to recover the balance, and was defended on the ground that the agreement created, for the period from July 1, 1913, to December 31, 1915, to which alone the action related, in favour of the colliery owners a special rate lower than that charged to other persons under the same circumstances. The learned judge, as I have said, took this view and gave judgment for a part only of the balances corresponding with the lower rate provided by the agreement.

The agreement is expressed to be made in order to prevent litigation with respect to the increases in rates on coal and coke and to be without prejudice to the legal rights and liabilities of either party. It then provides that in consideration of the colliery owners paying to the company as from January 1, 1916, and during the continuance of the agreement, ½d. per ton on all coal and coke they dispatch from their respective collieries to all places situate beyond the North Staffordshire railway in addition to the old rates, the company would accept

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the said additional payments in satisfaction of all claims for increases in the rates of conveyance during the continuance of the agreement on all coal and coke dispatched from the collieries whether the rates were payable by consignor or consignee. It was also agreed that the said payments should be accepted in satisfaction of all claims for increased charges for services at the private sidings of the collieries. It was then further agreed that in respect of the period from July 1, 1913, to December 31, 1915, the colliery owners should (subject to the maximum rates there referred to) pay "the sum of $\frac{1}{8}$d. per ton on all coal and coke which the colliery owners dispatched from their respective collieries, carriage paid by them, to all places situate beyond the North Staffordshire railway" (in addition to the old rates) "in satisfaction of all claims for increase of rates or new or increased charges at the private sidings of the said collieries in respect of all coal and coke traffic from such collieries the carriage on which has been paid or is payable by the colliery owners." A provision is then made for repayment by two of the owners of "the amount of the increases of rates or charges paid by them respectively in excess of the amounts hereinbefore agreed to be paid." The agreement concludes with provision for its continuance and determination which are not material for the present purpose.

The real question, I think, is, does the provision relating to the period in question create a rate for that period? If it does, the rate is lower than that payable by persons not parties to the agreement, the concession being made to the owners, and to them in respect only of goods sent carriage paid. The respondent, who pays the carriage, would not obtain the benefit. I think it is clearly a rate. It is expressed to be payable subject to the maximum rates and in satisfaction of all claims for increase of rates; and in the clause relating to the repayment to two of the colliery owners, what they are to be repaid is described as "the amount of increases of rates or charges paid by them respectively in excess of the amounts hereinbefore agreed to be paid," i.e., as I read it, in excess of the amount of the increase of rates agreed to be paid. If this is the true construction of the agreement, then it seems to me

clearly to infringe the provisions of s. 90 of the Railways Clauses Consolidation Act, 1845.

But it is said that so to hold would prevent a railway company from compromising any claim for rates on payment of a smaller sum than that lawfully demanded, however bona fide may be the compromise and whatever the consideration for it. For myself I do not intend to decide any such question; it may well be that under some circumstances a company may be entitled for good and sufficient reasons, e.g., the inability of the trader to pay or some similar reason, to accept less than the full demand—as to this I desire to leave the question entirely open. But the present case is in my opinion a very different one. The company desire to increase their rates—litigation ensues and the company come to terms under which they forego a part of the proposed increase, receiving, it is true, a collateral advantage inasmuch as the rate, being payable by the owners in respect of all coal dispatched from their collieries, is more easily collected. For the future all persons are on the same footing because as between the railway company and the owners the latter are the persons to pay. But for the past, the owners in cases where they pay the carriage obtain an advantage over those traders who themselves pay it. This agreement, as I have said, creates an unequal rate which is in contravention of s. 90 and none the less that the agreement is made by way of compromise of a dispute.

In my opinion the appeal must be dismissed.

SCRUTTON L.J. The North Staffordshire Railway Company in June, 1913, duly gave notice of increases in their rates for the carriage of coal. Many customers, including Mr. Edge, declined to pay the increased rates, and the company's claims against them for the increased rates gradually increased in amount till the beginning of 1916, while two large traders took proceedings before the Railway and Canal Commissioners to have the increases declared invalid. On February 11, 1916, the company effected an agreement of compromise with a number of the large collieries on the terms that (1.) for traffic after January 1, 1916, the collieries should pay an increased

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rate of one halfpenny per ton on all coal they sent from their collieries to all places situated beyond the North Staffordshire railway; and (2.) that for traffic from July 1, 1913, to January 1, 1916, the collieries should pay an increase of one-eighth of a penny per ton on all coal the collieries had dispatched, carriage paid by them, to all places situate beyond the North Staffordshire railway. Both the halfpenny and the one-eighth of a penny were less than the increase in rates claimed.

Having made this agreement, to which Mr. Edge was not a party, the railway company then claimed from Mr. Edge the full increased rates on his traffic between June, 1913, and January 1, 1916. He replied that as they were only recovering an increase of one-eighth of a penny per ton from the collieries, they could not recover more from him, as to do so would be contrary to s. 90 of the Act of 1845. Rowlatt J. held that the defence of Mr. Edge was a good one. The railway company appeal.

Under s. 90 of the Act of 1845, all tolls shall be charged equally at all times to all persons and at the same rate in respect of all goods of the same description, passing only over the same portion of the line under the same circumstances. If any of these identities or similarities are absent, the remedy of the customer complaining of inequalities is under the undue preference section of the Act of 1854, and not under the equality section of the Act of 1845; and circumstances relevant under the undue preference section may be irrelevant under the equality section. In the present case the circumstances are the same, and we have to see whether there are tolls not "charged equally." We have the guidance on the construction of the section of Lord Blackburn's views in *Evershed's Case* (1), and of Lord Herschell's views in *Phipps' Case*. (2) The Act of 1845 demands absolute rigid equality without elasticity. Circumstances as to the person as a possible future customer to be kept and encouraged are to be disregarded. The similar circumstances are in respect of the goods and their transit, not of the character of the customer. Whatever

(1) 3 App. Cas. 1019, 1038. (2) [1892] 2 Q. B. 229, 249.

Parliament might have said, they have required absolute equality, perhaps because, as Lord Blackburn thought, it was felt that if under any circumstances you might disregard equality of charge, it might be made a cloak for inequalities of charge under unjustifiable circumstances. Thus in the *Denaby Main Case* (1) the railway company was not allowed to make a rebate to encourage a growing industry, nor in *Evershed's Case* (2) to make such a rebate to keep goods which would otherwise go by a rival route.

The question, then, in this case is what is meant by "charging tolls equally at all times to all persons." And numerous cases of difficulty were put. May the company compromise a claim with a debtor of doubtful solvency, without complaint from those solvent people who pay in full? What will happen if the company claims from all? Some pay, some resist and succeed. Can those who acquiesced then recover their overpayment? Can the company make a compromise covering a number of matters with a trader one of which is a reduction of rate without affecting its position in respect of that rate to all other traders who have not the other matters in difference to settle? The answer seems to turn on the meaning of the words "charge equally." They clearly do not refer to ultimate recovery. A company who has claimed from all does not the less charge equally because a trader to whom in good faith it has given credit becomes insolvent and can only pay a part of the charge. Nor are the words infringed by a failure of power effectively to recover not arising from the action of the company. If the people who resist the claim win in the Courts, those who have acquiesced and paid cannot recover, for all have been charged equally, and it is not the company's fault that some cannot be forced to pay. Apart from duress, those who pay have paid under mistake of law and cannot recover their payments as unequal charges. But I think the words do involve a continued claim by the company at all times, not destroyed in effect by any agreement or volition of the company; and if the company, though originally claiming from all, cannot recover in full from some because the

(1) 11 App. Cas. 97. (2) 3 App. Cas. 1029.

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company has made an agreement compromising their claim, and yet claim in full from others, the company in my opinion are not claiming equally from all in the same circumstances, and they cannot consider among the circumstances external reasons of policy which lead to the compromise. If this is the true construction of the statute, the company in this case are claiming and recovering one rate from the collieries and another from Mr. Edge. Or to put it in another way, the rate which they are claiming from Mr. Edge they have prevented themselves by their own agreement from claiming from the collieries in respect of the same goods under the same circumstances. This they cannot, in my opinion, do.

I agree therefore with the result arrived at by Rowlatt J., and think the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Burchells.*

Solicitors for respondent: *Parker, Garrett & Co.* for *Alex. Wilson & Cowie, Liverpool.*

W. H. G.

HOLMAN & SONS, LIMITED, FOR OWNER OF THE S.S. NEFELI *v.* MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

1918
Nov. 28;
Dec. 9.

Insurance (Marine)—Policy on Increased Value and Excess Liability—Indemnity—Liability of Assurers to contribution.

A steamship was insured by ordinary policies for 39,000*l.*, and was therein valued at the same sum.

By another policy a sum of 1855*l.* was insured, and was to be upon increased value of hull, machinery, &c., and the policy, both in the body of the document and upon a slip attached, was designated as being "against the risk of total, constructive or compromised total loss as settled on hull and machinery policies but including as per clause attached liability for general average, salvage charges, sue and labour expenses or claims under the running-down clause in excess of the declared value in hull and machinery policies . . . ."

During the time covered by the policies salvage services were rendered to the steamer, and there was a general average expenditure, and by reason of the value of the steamer adopted in the salvage action and the contributory value in respect of the general average expenditure being each in excess of 39,000*l.* the proportions of the salvage award and of the ship's contribution to the general average expenditure borne by the ordinary policies were respectively less than the salvage award and the ship's contribution to the general average expenditure; and, therefore, an excess liability in both cases attached to the shipowner:—

Held, that the policy for 1855*l.* was one of the usual marine policies upon a res with the ordinary ancillary clauses, and not one of the unusual policies against a liability; and therefore the basis upon which the assurers under the policy for 1855. were liable to contribute to the excess amount of salvage and general average respectively was the payment by them of proportionate parts thereof in the proportions that the 1855*l.* bore to the total excess valuation and total excess contributory value of the steamship respectively.

In *Joyce* v. *Kennard* (1871) L. R. 7 Q. B. 78 and *Cunard Steamship Co.* v. *Marten* [1902] 2 K. B. 624; [1903] 2 K. B. 511 the policies were exceptional instances of insurance against liability.

AWARD stated by an arbitrator in the form of a special case. A policy of insurance was entered into on February 20, 1915, by the assured, Messrs. John Holman & Sons, Limited, as agents for the owner of the s.s. *Nefeli*, with the assurers, the Merchants' Marine Insurance Company, Limited. The *Nefeli* was insured by ordinary policies for 39,000*l.*, and was therein valued at the same sum. The total amount insured by the policy with the assurers was 1855*l.*, and was declared to be upon

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increased value of hull, machinery, etc. During the time covered by the policies salvage services were rendered to the *Nefeli*, and the amount of salvage and costs payable was 12,832*l.* 17*s.* 3*d.* The value of the *Nefeli* as adopted in the salvage action was 62,000*l.*, and the proportion of the salvage award borne by the ordinary policies was 8072*l.* 5*s.* 8*d.*, leaving a balance of 4760*l.* 11*s.* 7*d.* as the excess liability attaching to the owner by reason of the *Nefeli's* being valued for salvage at more than the insured valuation.

A similar situation arose with regard to certain general average expenditure, which was as follows:—During the time covered by the policies there was general average expenditure in respect of which the contributory value of the *Nefeli* was 53,007*l.* The ship's proportion of the expenditure on her contributory value was 188*l.* 12*s.* 10*d.*, and the proportion paid by the ordinary policies was 138*l.* 15*s.*, leaving a balance of 49*l.* 17*s.* 10*d.* as the excess liability attaching to the shipowner, by reason of the contributory value of the *Nefeli* being more than the insured valuation.

The policy of February 20, 1915 (so far as material), was as follows: After reciting that the assured had promised or otherwise obliged themselves to pay forthwith for the use of the assurers "the sum of 13*l.* 4*s.* 4*d.* as a premium at and after the rate of 14*s.* 3*d.* per cent. for such insurance," it continued: "Now this policy of insurance witnesseth that in consideration of the premises and of the said premium the said company promises and agrees with the assured their executors administrators and assigns that the said company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy and may attach to this policy in respect of the sum of 1855*l.* hereby insured which insurance is hereby declared to be upon increased value of hull, machinery . . . ."

The policy was expressed in the body thereof as follows: "This insurance is against the risks of total, constructive or compromised total loss as settled on hull and machinery policies but including as per clause attached liability for general average, salvage charges, sue and labour expenses or

claims under the running-down clause in excess of the declared value in hull and machinery policies . . . . for and during the space of time from the 8th day of February 1915 to the 17th day of June 1915 both days inclusive beginning and ending with Greenwich mean time."

The sue and labour clause contained in the policy was in the following terms : " And in case of any loss or misfortune it shall be lawful for the insured their factors servants and assigns to sue labour and travel for in and about the defence safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance the charges whereof the company shall bear in proportion to the sum hereby insured in so far as it concerns only the company's liability for excess general average, salvage charges, and R.D.C. as herein provided."

The policy contained (inter alia) the following clauses in the margin : " In ascertaining whether the vessel is a constructive total loss the insured value say 39,000*l.* shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

" This insurance is hereby declared and agreed to be against the risks of total, constructive or compromised total loss as may be settled on hull and machinery policies and is to include also any liability which may attach to the shipowner in consequence of the hull and machinery being valued for contribution to general average or salvage charges at more than the insured valuation, also for any liability in excess of the valuation of 39,000*l.* in hull and machinery policies for claims under the collision clause therein."

Subject to the opinion of the Court the arbitrator awarded that the basis upon which the assurers were liable to contribute to the excess general average was that the assurers should pay a proportionate part thereof in the proportion that the amount insured by them bore to the total excess contributory value of the *Nefeli*. The question in dispute between the parties was as to the basis on which the assurers were liable to contribute to the excess.

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Mackinnon K.C. and *Jowitt* for the assured.

R. A. Wright K.C. and *Le Quesne* for the assurers.

The arguments sufficiently appear from the judgment.

In addition to the authorities cited in the judgment, s. 74 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), was referred to.

Cur. adv. vult.

Dec. 9. The following judgment was read by

SANKEY J. This is an award stated in the form of a special case, and raises a short point under a policy of insurance entered into by Messrs. John Holman & Sons, Limited, agents for the owners of the s.s. *Nefeli* and the Merchants' Marine Insurance Company, Limited. [The learned judge, having stated the facts, continued :] The question in dispute between the parties is as to the basis upon which the assurers are liable to contribute to this excess.

It was contended by the assured that the policy under discussion was a contract of indemnity up to 1855*l.* and that therefore they were entitled to recover the whole sum. It was contended by the assurers that the basis upon which they were liable to contribute to the excess was that they should pay a proportionate part thereof in the proportion that the amount insured by them bears to the total excess contributory value of the *Nefeli*. The arbitrator upheld the assurers' contention, but stated his award in the form of a special case.

The assured urged that this was not an ordinary policy of marine insurance under which the assurers would be liable to pay in proportion as the amount insured stood to the amount at risk, but that it was a policy of indemnity, or at any rate that it was partly one and partly the other, and that the clause which they prayed in aid was an indemnity clause, and they cited *Joyce* v. *Kennard* (1) and *Cunard Steamship Co.* v. *Marten.* (2)

In my view both those cases are exceptional instances of an insurance against liability, the ordinary rule in marine

(1) L. R. 7 Q. B. 78.
(2) [1902] 2 K. B. 624; [1903] 2 K. B. 511.

policies being that the assurer is entitled to prove that part only of the subject matter of the policy is covered and to limit his payment proportionately. The words in the present policy are: "Now this policy of insurance witnesseth that in consideration of the premises and of the said premium the said Company promises and agrees with the assured their executors administrators and assigns that the said Company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject matter of this policy and may attach to this policy in respect of the sum of 1855*l.* hereby insured which insurance is hereby declared to be upon increased value of hull, machinery, etc." It will be observed that the contract starts by being a policy upon the res described as "the increased value of hull, machinery, etc.," and is designated both in the body of the document and upon a slip attached as being "against the risk of total, constructive or compromised total loss as settled on hull and machinery policies." It is true that it goes on to include liability for general average salvage charges, sue and labour, etc.: "This insurance is against the risks of total, constructive or compromised total loss as settled on hull and machinery policies but including as per clause attached liability for general average, salvage charges, sue and labour expenses or claims under the running-down clause in excess of the declared value in hull and machinery policies . . . ." But in my view this addition does not convert the policy on the res into a policy against liability, nor can the addition be construed in itself as a policy against liability. It is merely ancillary to the main purpose of the policy and for the preservation of the res against the contemplated perils.

In the result I think that the policy is one of the usual marine policies upon a res with the ordinary ancillary clauses, and not one of the unusual policies against a liability, and that the award of the arbitrator was right and must be upheld.

Award affirmed.

Solicitors for assured: *Holman, Fenwick & Willan.*

Solicitors for assurers: *Waltons & Co.*

J. E. A.

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Dec. 10, 11, 12.

AKTIESELSKABET OLIVEBANK *v.* DANCK SVOVLSYRE FABRIK.

Ship—Bill of Lading—Option of Consignee to order Ship to One of several Ports—Order to a Port which is closed—Whether valid Exercise of Option—Liability for Freight.

A cargo of nitrate was shipped on board a vessel of the plaintiffs', described in the bill of lading as bound to certain ports in the United Kingdom "for orders." By the terms of the charterparty, the conditions of which were incorporated in the bill of lading, the port of discharge was to be any safe port in the United Kingdom or any one of several named ports in Denmark. On the arrival of the ship in the United Kingdom she received orders from the defendants, the indorsees of the bill of lading, to go to one of the named Danish ports, which had by that time become an impossible port owing to the fact, known to the defendants, that any further importation of nitrate into Denmark had been prohibited by the British Government for that year. The master, being unable to go to the port ordered, discharged his cargo in the United Kingdom. In an action against the defendants for freight:—

Held, that as amongst the ports of discharge covered by the defendants' option there were some ports to which, notwithstanding the prohibition, the ship could go—namely, any safe port in the United Kingdom—it was the defendants' duty, when exercising their option, to select one of those ports, and that as they failed to do so the plaintiffs were entitled to discharge the cargo where they did, and to claim the freight.

Quaere, whether the plaintiffs could have claimed freight if, the other circumstances being the same, the option in the charterparty had been confined to Danish ports?

TRIAL of action before Bailhache J.

The plaintiffs were the owners of the Norwegian sailing ship *Springbank*, on which under a charterparty made June 24, 1915, between the plaintiff and Andrew Weir & Co. as charterers, there was loaded in January, 1916, at Caleta Coloso, in Chili, a cargo of nitrate of soda. By the charterparty the vessel, having loaded, was "to proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom (excluding Manchester Canal) . . . . and there deliver the same (sic) on being paid freight at the rate of 60*s.* if discharged at a safe port in the United Kingdom after calling for orders, or 65*s.* if discharged at Aarhus, Aalborg, Elsinore, or Copenhagen." In the bill of lading the *Springbank*

was described as "bound for Queenstown, Falmouth, or Plymouth for orders," no port of discharge being named, but it contained the clause "Payment of freight and all other conditions as per charterparty." The cargo was sold by Andrew Weir & Co. to the defendants, and the bill of lading was indorsed to them. The ship sailed on January 18, and arrived at Falmouth on May 7, 1916, and on May 10 she received orders from the defendants as consignees to proceed to Aalborg, in Denmark. At that time the British Government had introduced a system of limiting the amount of nitrate of soda which might be imported into certain neutral countries, including Denmark. The limit which was permitted to be imported into Denmark for any one year was 33,000 tons, and at the time when the ship was given orders to proceed to Aalborg, Denmark had to the knowledge of the defendants already exhausted her allowance, so that the defendants knew that the port to which they ordered the ship was one at which it was impossible to discharge the cargo. The master refused to accept the order; and as the defendants insisted on their right to order the ship to a Danish port, he, in order to avoid further detention of the ship, took her to Plymouth, which is a nitrate discharging port, and there discharged the cargo. The plaintiffs brought the action against the defendants as indorsees of the bill of lading for freight and demurrage or damages for detention.

R. A. Wright K.C. and *Le Quesne* for the plaintiffs. When the *Springbank* arrived at Falmouth the master was entitled to receive effective orders as to the port of discharge. He did not receive any effective orders within the time limited by the charterparty, for the Danish port named was an impossible port, and under those circumstances he was entitled to discharge at any of the ports of discharge specified in the charterparty and claim the freight. Demurrage or damages for detention are also payable in respect of the period the ship was kept waiting. The defendants were bound to select a port to which the ship could go: *Dahl* v. *Nelson* (1); *Ogden* v. *Graham*. (2) It cannot be that if a number of optional

(1) (1881) 6 App. Cas. 38, 44. (2) (1861) 1 B. & S. 773.

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ports are mentioned in the charterparty, and one of them becomes impossible, the consignee may elect to order that port, and so avoid the payment of freight.

Leck K.C. and *A. Neilson* for the defendants. Freight cannot be claimed unless either the voyage has been performed or a new arrangement has been entered into for the payment of freight pro rata itineris : *St. Enoch Shipping Co.* v. *Phosphate Mining Co.* (1) In this case the delivery was to be at a Danish port, and the cargo was not delivered there, therefore freight not payable.

Wright K.C. in reply.

BAILHACHE J. This is an action brought by Norwegian shipowners against Danish importers for freight and damages for detention or demurrage. Messrs. Andrew Weir & Co. sold a cargo of nitrate to the defendants, and it was loaded on board the plaintiffs' ship *Springbank*. The bill of lading, which was dated January 18, 1916, described the vessel as "bound for Queenstown, Falmouth, or Plymouth for orders," and did not mention any port of destination. But it contained the clause "Payment of freight and all other conditions as per charterparty," and therefore we must look to the charterparty to see what the possible ports of destination were. The charterparty, which was dated June 24, 1915, provided that the port of discharge might be "any safe port in the United Kingdom, excluding Manchester Canal," and certain named ports in Denmark, including Aalborg. The *Springbank* sailed on January 18, 1916, and arrived at Falmouth for orders on May 8. She received orders for Aalborg. At that time it was impossible to take a cargo of nitrate to that port owing to the fact that the British authorities had resolved not to allow nitrate in excess of 33,000 tons to be shipped to Denmark in any one year; and as the nitrate already sent to Denmark for the year 1916 exceeded that amount, the *Springbank* was unable to get permission to proceed to the port ordered during that year. The master accordingly refused to accept the order, and proceeded to Plymouth,

(1) (1916) 2 K. B. 624.

where her cargo was discharged in July of that year. The consignees at the time they tendered orders for Aalborg knew quite well that it was impossible for the *Springbank* to proceed to Aalborg or to any other Danish port. According to the charterparty they had the option of declaring Aalborg as the port of discharge, but the question is whether, with knowledge that Aalborg was, under the circumstances, an impossible port, they were within their rights in naming it as the port of discharge. To my mind this question is almost bare of direct authority. There are, however, two cases which were cited to me, and to which I wish to refer. One is *Ogden* v. *Graham*. (1) There a ship was chartered to proceed "to a safe port in Chili." There was a prohibition by the Chilian Government against ships entering a certain port in Chili, and subsequently to the date of the prohibition the charterers named that port. Blackburn J. said: "In the absence of all authority bearing on the matter, I am of opinion that under the terms of a charterparty like the present the charterer is bound to name a place which at the time he names it is one into which the ship can get; and that although the ship can physically get into it, as far as navigation and what may be called the natural incidents are concerned, yet if that would be at the certain risk of confiscation, then the place is not a safe port." So far that does not assist us much on this matter. But then the judge goes on to say: "If at the time the place had been named the port had been open, or if that particular port had been mentioned in the contract itself, and the port had been found closed before the ship could enter, then the shipowner would have been saved from being obliged to go in by the clause of exception as to the restraint of princes and rulers; but he would have had no right of action against the charterer for being prevented from earning the freight which he could not earn." By the words "if that particular port had been mentioned in the contract" I understand Blackburn J. to have meant "that particular port and no other," and to have suggested that if the charterer had an option to order the ship to another port

(1) (1861) 31 L. J. (Q. B.) 26, 29.

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Pallhache J.

to which the prohibition did not apply, and did not avail himself of that option, he would not be relieved from his obligation to pay the freight. The other case to which I wish to refer is *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1) There the ship was to proceed to "any safe berth as ordered on arrival in dock at Garston." Bowen L.J. there dealing with the option to nominate a berth said: "Then we were told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but he is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock, that is one that is reasonably fit for the purpose of delivery. It will not do for instance to choose a dock the entrance to which is blocked—that would be practically no exercise at all of the option, and I think this is what Lord Blackburn meant in *Dahl* v. *Nelson* (2) and follows from the cases he there cited of *Ogden* v. *Graham* (3) and *Samuel* v. *Royal Exchange Assurance Co.* (4) To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time." I think the proper inference from those judgments, and certainly the bent of my own mind if there were no authority on the subject at all, is that under circumstances like those in the present case the nomination of Aalborg as the port of discharge, when it was perfectly well known that the ship could not proceed there because of the restriction on the carriage of nitrates from the United Kingdom to Denmark, was in truth and in fact no exercise of the option at all. It was a mere nugatory nomination, and one which could not possibly be

(1) [1891] 2 Q. B. 647, 652.
(2) 6 App. Cas. 38, 44.
(3) 1 B. & S. 773.
(4) (1828) 8 B. & C. 119.

acted upon. I have come to the conclusion that under the circumstances existing at the time when the *Springbank* arrived at Falmouth, and was entitled to orders, it was the duty of the defendants to give her orders, within the limits of the ports mentioned in the charterparty, to go to some port to which she could proceed within a reasonable time. What would have happened if there had been no such ports it is unnecessary to say. But in this case there were such ports, because the limits of the charterparty included "any safe port in the United Kingdom excluding Manchester Canal;" therefore it was open to the consignees to nominate some port in the United Kingdom, and that, I think, they ought to have done. That being so, the plaintiffs are entitled to succeed in respect of their claim for freight and such damages for detention as they can show.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Botterell & Roche.*
Solicitors for the defendants: *W. A. Crump & Son.*

J. F. C.

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Nov. 19; Dec. 20.

STEARN *v.* PRENTICE BROTHERS, LIMITED.

Trespass—Animals feræ naturæ—Rats—Attracted to Premises—Damage to adjoining Property—Cause of Action.

The defendants carried on the business of bone manure manufacturers on premises near the plaintiff's farm. For the purpose of their business they had on their premises a heap of bones, which caused large numbers of rats to assemble there. The rats made their way from the defendants' premises on to the plaintiff's land, and ate his corn, causing substantial loss, in respect of which the plaintiff claimed damages from the defendants. It was not proved that the bones kept by the defendants were excessive or unusual in quantity:—

Held, that no cause of action had been established against the defendants.

Boulston's Case (1597) 5 Rep. 104b followed.

Bland v. *Yates* (1914) 58 Sol. J. 612 distinguished.

APPEAL from Stowmarket County Court.

The action was brought by the plaintiff, a farmer, for injury to his crops by rats, which, he alleged, the defendants, who carried on the business of bone manure manufacturers on premises contiguous to the plaintiff's fields, had suffered to collect on their premises in large numbers, and to escape and invade the plaintiff's crops.

It appeared from the evidence adduced on behalf of the plaintiff that the defendants had premises on land divided by a meadow from the plaintiff's fields where the damage was done. The defendants had a factory on their premises where they had carried on the business of artificial manure manufacturers for at least 30 years. The plaintiff had made no complaint till the years 1916 and 1917, when there had been a large increase in the numbers of rats on the plaintiff's fields. For the purpose of their business the defendants had a heap of bones and this attracted the rats; between the defendants' factory and the plaintiff's fields there were runs which showed that large numbers of rats had passed backwards and forwards between the defendants' factory and the plaintiff's fields. There was no evidence to show that the bone department of the defendants' business had been increased or that the heap of bones was larger than in past

years, or that the increase in the numbers of rats was due to anything done by the defendants. The county court judge at the conclusion of the plaintiff's case held that there was no evidence to prove a cause of action, and entered judgment for the defendants. The plaintiff appealed from that judgment.

Haydon for the plaintiff. If the business of a bone manufacturer as carried on by the defendants is calculated to encourage the assembling and multiplying of rats in unreasonable quantities, the proprietor of the business is liable for damage done by the rats to his neighbour's property, unless he can show that he has endeavoured, by taking proper steps, to prevent the rats from doing the damage: *Bland* v. *Yates*. (1) If a man does an act, the natural or probable result of which will be the collection of something dangerous on his land, he is liable for any damage that is thereby caused, on the principle of *Rylands* v. *Fletcher*. (2) [He cited *Rex* v. *Moore* (3); *Walker* v. *Brewster* (4); *Bellamy* v. *Wells* (5); *Barber* v. *Penley* (6); *Giles* v. *Walker* (7); *Farrer* v. *Nelson* (8); Clerk and Lindsell on Torts, 6d. ed., p. 462.]

C. E. Jones for the defendants. The county court judge rightly held on the evidence that no cause of action had been proved: *Boulston's Case*. (9)

Cur. adv. vult.

Dec. 20, 1918. BRAY J. delivered a written judgment, in which after stating the facts, as set out above, he continued as follows: It was quite consistent with the plaintiff's evidence that the increase in the number of rats was due to its being a good breeding year, or to the fact that the neighbours had not killed down the rats sufficiently in the previous winter for want of labour or some other cause. It was not shown that rats bred on the defendants' premises, nor did it appear where they bred, nor that the defendants

(1) 58 Sol. J. 612.
(2) (1868) L. R. 3 H. L. 330.
(3) (1832) 3 B. & Ad. 184.
(4) (1867) L. R. 5 Eq. 25.
(5) (1890) 63 L. T. 635.
(6) [1893] 2 Ch. 447.
(7) (1890) 24 Q. B. D. 656.
(8) (1885) 15 Q. B. D. 258.
(9) 5 Rep. 104b.

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had neglected any duty, if duty there was on them, to destroy the rats. The plaintiff had made no attempt to destroy rats or to protect his crops from being damaged by them, although during the year 1917 he had occupied the meadow. There remained, therefore, only the facts that the defendants had a heap of bones on their land which was likely to attract rats, and had, in fact, attracted rats, that the plaintiff had ripening corn crops on his land which would afford food for rats, and that rats were in the habit of crossing the meadow backwards and forwards between the defendants' factory and the plaintiff's crops, and by feeding on the plaintiff's corn did substantial damage. Is a man who in the ordinary course of his business has large quantities of food on his premises which is likely to attract rats responsible for damage caused by rats so attracted without any evidence that the quantities of food were unusual or excessive? It is certain that this is a novel cause of action. Bone manure manufactories must have existed for a very great number of years. Bones are a natural but valuable waste product from the rearing of cattle or sheep for slaughter for the purpose of providing meat. Rats have been the enemies of farmers ever since land was cultivated. If proper measures are not taken by occupiers of lands to destroy them they quickly increase. They are feræ naturæ. I think under these circumstances it is incumbent on the plaintiff to produce some authority in support of his proposition. As Lord Coleridge C.J. said in *Giles* v. *Walker* (1): "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil."

Several cases were cited which I will examine. The earliest is *Boulston's Case.* (2) It was there held that "if a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbours' land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneys come on his neighbour's land he may kill them, for they are feræ naturæ, and he who makes the coney-

(1) 24 Q. B. D. 656, 657. (2) 5 Rep. 104b.

boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill." That was an action on the case as here, and seems to be directly in point. I am not aware that this decision has ever been overruled or questioned. It was approved and followed in *Brady* v. *Warren*. (1) It was cited in *Farrer* v. *Nelson* (2), a case relied on by the plaintiff. There, the plaintiff was tenant to the defendant of a farm, the defendant reserving the right to kill game. The defendant had reared large quantities of pheasants and had turned them down in a wood adjoining the plaintiff's land, whence they had strayed on to the plaintiff's land and damaged his crops. This of course was clearly distinguishable from *Boulston's Case* (3), as the defendant had deprived the plaintiff of his right to kill or destroy the pheasants. In giving judgment Pollock B. said: "The moment he brings on game to an unreasonable amount or causes it to increase to an unreasonable extent, he is doing that which is unlawful, and an action may be maintained by his neighbour for the damage which he has sustained." That case does not, in my opinion, support the plaintiff's proposition. *Rex* v. *Moore* (4) and the cases which followed it, all cases of nuisance, were cited to us. They lay down that if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance. These cases are clearly distinguishable in my opinion. The plaintiff could not kill the crowd or stop them. The crowd are not feræ naturæ. The latest case relied on was *Bland* v. *Yates*. (5) There Warrington J. decided that an unusual and excessive collection of manure was a nuisance, and he granted an injunction restraining the defendant from depositing, stacking and handling manure on his land so as to be a nuisance. The nuisance consisted partly of smell and partly of flies, which nested and bred in the manure. That case is, in my opinion, distinguishable. The learned judge found that there was an unusual and excessive collection of manure. There is no

(1) [1900] 2 I. R. 632.
(2) 15 Q. B. D. 258, 260.
(3) 5 Rep. 104b.
(4) 3 B. & Ad. 184.
(5) 58 Sol. J. 612.

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evidence here of anything unusual or excessive done by the defendants.

In my opinion there is no authority for the proposition put forward by the plaintiff. I think the appeal fails, and must be dismissed with costs.

AVORY J. I have had the advantage of reading my brother's judgment. I agree with it, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiff: *Whites & Co. for Greene & Greene, Bury St. Edmunds.*

Solicitors for defendants: *Elvy Robb & Welch, for Turner, Turner & Martin, Ipswich.*

F. O. R.

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Nov. 27, 28, 29; *Dec.* 3, 5.

[IN THE COURT OF APPEAL.]

ISAACS *v.* HOBHOUSE.

[1918 I. 312.]

Practice—New Trial—Surprise—Action tried with Jury—New Issue raised by Defendant at Trial—No Application for Adjournment by Plaintiff—Trial lasting some Days after New Issue known.

In an action for libel, tried with a jury, one of the main questions was as to what took place at two interviews between the plaintiff and the defendant, the dates of which were not in issue on the pleadings. Late on the second or early on the third day of the trial the plaintiff first became aware that the defendant was going to say that the date of the first interview was some months earlier than the plaintiff thought was admittedly the date, and on this new issue the plaintiff was not prepared with evidence to corroborate his recollection of the date. The plaintiff did not ask for an adjournment to enable him to procure evidence, and the trial proceeded for some days longer and resulted in a verdict for the defendant. The plaintiff applied for a new trial on the ground of surprise, alleging that it would have been useless to ask for an adjournment as the case was being tried with a jury, and his principal witness on the point was at the time in America, and he did not then know what evidence that witness might be able to give:—

Held, that in the circumstances the proper inference was that the plaintiff, by not applying for an adjournment to enable him to procure evidence to meet the change of date, took his chance of obtaining a verdict on the evidence then at his disposal, and a new trial ought not to be granted.

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APPLICATION for a new trial.

The action was for libel. The plaintiff was the managing director of the Marconi's Wireless Telegraph Company, Limited, and the defendant was at the material dates His Majesty's Postmaster-General. The action arose out of a statement made by the defendant in the House of Commons on March 19, 1918, which, at the plaintiff's request, he repeated in two letters of March 20 and 22, 1918, published in certain newspapers. The statement by the defendant in the House of Commons was made in reference to a statement made by counsel in opening the case for the Marconi Company at the trial of a petition of right by the company against the Crown, claiming a declaration, in substance, that the company were entitled to damages in consequence of the repudiation of a contract for the construction of certain long-distance imperial wireless stations. (1)

In the spring of 1914 the defendant, soon after he was appointed Postmaster-General, went to Berlin in connection with wireless telegraphy, and visited the wireless station of the Telefunken Company. In July, 1914, the plaintiff received a letter from the Telefunken Company, signed by two directors thereof, in which it was stated that when the defendant was in Berlin he made an offer to the company that they should start in competition in England with the Marconi Company. Two interviews took place between the plaintiff and the defendant, the first at the defendant's house and the second at the Automobile Club, and the statements complained of as libellous related to what took place at those interviews. The plaintiff in a letter dated June 29, 1916, to the then Postmaster-General (Mr. J. A. Pease), stated that he was astonished to hear that the defendant now alleged that there was no foundation for the statement contained in the letter from the two directors of the Telefunken Company; that early in 1915 he met the defendant first at his private house, at his request, when he informed him personally of the contents of the letter, and shortly afterwards, also at his wish,

(1) The petition was heard in March, 1918, when the Crown, before any evidence was given, consented to a declaration.

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at the Royal Automobile Club; that "on both occasions he (the defendant) admitted that he did make the offer in question to the Telefunken, but said he did so because he thought that competition would be a very good thing for the country, although he had since recognized that as a Minister of the Crown he should not have done so, and he asked me what it was my intention to do. He pointed out that I had my foot on his neck. Did I intend to crush him, which would mean his leaving the Government, or was I disposed to help him?" The defendant in his statement to the House of Commons (1), which was repeated, as above mentioned, in two letters published in certain newspapers, denied that he had tried to induce the Telefunken Company to start a factory in England in competition with the Marconi Company. He said that the first meeting, which he thought not an unfriendly one, was inconclusive, and he kept no note of it, and he read a note which he made when he returned to his house as to what happened at the second interview with the plaintiff, and said that if his note was accurate the plaintiff's account was a pure fabrication; that the statement in the Telefunken Company's letter was entirely and wholly untrue; and that the plaintiff had taken advantage, in the absence of witnesses, to give a wholly untrue and malicious account of the private interview. The defendant pleaded justification.

The action was tried before Darling J. and a special jury. The trial began on Tuesday, July 16, 1918, and occupied eight days, ending on Thursday, July 25, in a verdict for the defendant.

The plaintiff applied for a new trial on the ground (among others) of surprise. The ground of surprise was that it appeared from the statement of claim that the two interviews took place in the early part of 1915, and that this was not denied in the defence; that the plaintiff in his evidence stated that the interviews took place on February 4 and 5, 1915; that at the trial the defendant stated that the first of the two interviews

(1) The full report of the statement made by the defendant in the House of Commons is set out in 104 House of Commons Debates, 5th series, vol. 2 of Session 1918, cols. 826–833.

took place in September, 1914, and that this alteration of date only became known to the plaintiff or his legal advisers either late on the second day or on the third day of the trial, and that they had come unprepared with any evidence to corroborate the plaintiff as to the date. The point is elaborated in the following affidavit made by the member of the firm of solicitors who had the conduct of the plaintiff's case, which stated in substance as follows: In preparing the plaintiff's case it became his duty and the duty of the plaintiff's counsel to consider the issues and side issues which would or might arise at the hearing with particular regard to the evidence which would have to be given at the trial and to the witnesses to be called on behalf of the plaintiff. As appeared from the statement of claim, the plaintiff's case was that he had two interviews with the defendant following one upon the other in the early part of 1915, the first at the defendant's house and the second at the Royal Automobile Club. In view of the defendant's statement in the House of Commons, it appeared to be quite clear that the plaintiff's accuracy as to the dates and places of the two interviews was not disputed by the defendant. (1) In the above circumstances it appeared manifest when preparing for trial that there was no issue between the parties as to the approximate dates of the said interviews. Had it appeared that there was or was likely to be an issue as to the dates, he would have taken proofs from and secured the attendance of witnesses who were in a position to corroborate the plaintiff upon this point. In that case he would have communicated with, obtained proofs from, and secured the attendance at the trial of, among others, Lord Reading, Mr. Marconi, and the plaintiff's former chauffeur, and would have made inquiries which would have resulted in his obtaining further evidence. In view of no such issue being raised it appeared to him unnecessary to secure the evidence of these witnesses, and he would not have consented to the hearing being fixed (2) for a date when neither Lord

(1) Counsel's opinion on evidence was made an exhibit to the affidavit.

(2) The plaintiff consented to an application by the defendant to have a day for the trial fixed before the long vacation.

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Reading (1) nor Mr. Marconi would be in England if he had any ground for supposing that the plaintiff and defendant would be in direct conflict as to the date of the interview at the defendant's private house. During the trial it transpired for the first time that the defendant's account of the first interview was that it took place, not in February, 1915, but in September, 1914, "and the question then raised for the first time as to which was the true date became and throughout the hearing continued to be a prominent issue in the case, and was relied upon by defendant as directly affecting the credibility of the plaintiff." The sudden introduction of this issue in the then stage of the proceedings took him completely by surprise, and it was too late to communicate with or secure the attendance of Lord Reading, and it was too late to make inquiries among various persons who might have been in a position to speak to circumstances relevant to the question of date. He did, however, learn from the plaintiff that among such persons there was his former chauffeur, and immediate steps were taken to trace him (the chauffeur having joined the army), but he was unable to see him and take his statement before the plaintiff's case was closed. The position therefore was that no witness other than the plaintiff was or could in the then circumstances have been called at the trial upon this question of date, whereas, if he had not been misled in the circumstances above set out into believing that their evidence was wholly unnecessary, he would have secured the attendance of witnesses whose evidence he believed would have corroborated that of the plaintiff on this vital issue as to the date of the first interview.

An affidavit by the Earl of Reading and also affidavits by the plaintiff's son and the chauffeur were produced as to the evidence which they could give upon the question of date. Lord Reading in his affidavit said that so long a time had elapsed since the happening of the incidents in question that it was difficult to recollect them in detail, more particularly as he had no personal interest in them, and merely intervened at the request of the defendant. He believed it was early

(1) Lord Reading was in July, 1918, in America.

in 1915 that the defendant came to see him, but he had no recollection of the date. The defendant came to see him because they had been associated in the Government, and asked him to convey to the plaintiff his assurance of the untruth of the statement in a letter from the Telefunken Company, and a day or two later the defendant inquired whether he could tell him (the defendant) whether the plaintiff would be willing to meet him at his private house, and he (Lord Reading) replied that if the defendant telephoned to the plaintiff and personally asked him to call he believed the plaintiff would do so.

Hawke K.C. and *Stuart Bevan* (*Hildesley* with them) for the plaintiff. The plaintiff is entitled to a new trial on the ground of surprise. During the course of the trial a serious issue arose as to the date of the first of the two interviews between the plaintiff and the defendant. The defendant at the trial, for the first time, said that the first interview took place in September, 1914, and not in February, 1915. The plaintiff and his advisers had no intimation of this alteration in date until either late on the second day of the trial or on the third day, and they were completely taken by surprise. The plaintiff thought it was common ground that the dates of the respective interviews were early in 1915. If the plaintiff had been informed when the application was made to fix a day for the trial that there was any issue as to the dates, he would not have consented to have the case heard in the absence of Lord Reading in America and in the absence of any other evidence which he might have been able to obtain as to the date of the interview at the defendant's house. He was misled into going to trial without any evidence on this point, but it is not suggested that the defendant deliberately misled the plaintiff.

[SCRUTTON L.J. You knew late on the second or third day of the trial that there would be an issue as to the date, and you did not ask for an adjournment to enable you to obtain evidence on the point. Must you not take the consequences of going on?]

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It would have been a futile application to ask for an adjournment, because the case was being tried with a jury, and it would have to be adjourned over the long vacation; and moreover, the plaintiff did not then know what evidence could be given upon the point. The affidavits now show what evidence can be given; and whether that evidence is strong or not it is relevant to the issue, and the plaintiff is entitled to have it submitted to a jury. The plaintiff was innocently misled into going to trial without the necessary evidence on this point, and the fault, if any, was in the defendant. It may be conceded that if the plaintiff had been told a reasonable time before the trial of the alteration of date, and had decided to go to trial on the evidence that he had and to take his chance, he could not afterwards apply for a new trial on the ground of surprise. There would, in that case, be no surprise. That is not this case. The defendant here has misled the plaintiff, and it is not fair to call upon the plaintiff at the trial either to prepare a new case or to apply for an adjournment. The only possible witness whose existence was known to the plaintiff at the time was the chauffeur who had been in his employment at the date, but he was in the army, and his address was not traced until late in the trial. He was at Bedford, and the plaintiff's advisers did not know what evidence he could give. It would have been of no use to call him in the absence of the evidence which Lord Reading might have given. Further, there is no rule of practice that a party who is surprised must apply for an adjournment to enable him to procure evidence to meet the new point. The rule as laid down by Lord Chelmsford in *Shedden* v. *Patrick* (1) is that "if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured . . . . no opportunity for producing that evidence ought to be given by the granting a new trial." That passage was cited with approval by Vaughan Williams L.J. in *H.M.S. Hawke* (2) and by Scrutton

(1) (1869) L. R. 1 H. L. Sc. 470, 545.

(2) (1912) 28 Times L. R. 319. The case is also reported, though not on this point, in [1913] P. 214, and [1915] A. C. 385.

L.J. in *Nash* v. *Rochford Rural Council* (1), where he said: "What evidence the Court will admit must depend very much on the circumstances of each case and how far the evidence could have been obtained before the trial by the party who seeks to adduce it with proper diligence." Each case has therefore to be decided according to its own circumstances. In *H.M.S. Hawke* (2) there was an application to adduce further evidence on the hearing of the appeal, and the objection was taken that no application was made at the trial for an adjournment. The Court, however, allowed the fresh evidence to be adduced. Again, in *Hippolyte Sohm* v. *Kilsby* (3) an application was made for a new trial on the ground of surprise, and objection was taken that no application for an adjournment was made at the trial, but the Court granted a new trial. That case is directly in point. In the words of the Lord Chief Justice in that case the new evidence here will have "a material bearing on the issue," or, as Vaughan Williams L.J. said in *The Olympic* and *H.M.S. Hawke* (4), the evidence is "relevant and material to the decision of the action."

[SCRUTTON L.J. referred to the judgment of Coltman J. in *Tharpe* v. *Stallwood*. (5)]

The decision in that case was that a party cannot get a new trial on the ground of surprise, where the only surprise is caused by his not having told his solicitor what his case is. The effect of the new evidence is for the jury and not for the Court. If the new evidence is relevant and material to the decision of the action the Court will grant a new trial. [*Richards* v. *Symes* (6) was also referred to.]

Douglas Hogg K.C. and *Eustace Hills* for the defendant were not called upon.

BANKES L.J. [After saying that there was no reason for granting a new trial on the ground of misdirection, continued:] I now come to the ground of surprise, and there is very little authority upon the question under what circumstances the

(1) [1917] 1 K. B. 384, 393, 394.
(2) 28 Times L. R. 319.
(3) The Times, March 21, 1914.
(4) [1913] P. 239.
(5) (1843) 6 Scott, N. R. 715, 730.
(6) (1742) 2 Atk. 319.

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Court ought to grant a new trial on that ground. Probably this is due to the fact that in former times a plaintiff could elect to be nonsuited, and if he was complaining of surprise, he had the remedy in his own hands by so electing and commencing the proceedings de novo. This may be said in reference to surprise, that the Court ought to be slow to listen to an application for a new trial on that ground because it is very easy to suggest that some fact has come upon a party entirely by surprise, and that after the trial he discovered material which would have enabled him to meet the point if he had known of it before. Otherwise, it would be very difficult to restrict the number of applications for a new trial on that ground. There may be cases in which the Court will grant relief; but the party must first establish the existence of surprise, and then he must establish that he has not elected to proceed with the materials at his command. He must further satisfy the Court that there is relevant evidence available which will be likely to affect the result if a new trial is granted. I will take it that there was surprise brought about by the fact of the defendant retreating from the position he had taken up in the House of Commons that there were two interviews in February, 1915. The discovery of that fact and its effect must be borne in mind. The change of case was indicated on the second or possibly the third day of a trial which lasted eight days, and the material effect, as it seems to me, of this indication in the first instance must have been to suggest to the plaintiff that this was a strong point in his favour, because the intimation that the defendant had made a mistake of memory in the date was, standing by itself, an intimation of a fact likely to tell in the plaintiff's favour. The next matter to be noticed is that when the defendant admitted the error and placed the date in September, the strength of his case on that point only gradually developed. What, then, was the position of the plaintiff? He may have been in doubt as to the best course to adopt under the circumstances. I do not know. But having regard to the time at which the fact first came to the knowledge of the plaintiff's advisers, we are furnished with a very meagre statement as to what their

decision was, and I am not prepared to accept the suggestion that there was not an election to proceed with the materials then at their command. That would be sufficient to dispose of the application for a new trial on the ground of surprise. I am not satisfied on that point, and in the absence of sufficient evidence to satisfy me on that point, I am not prepared to grant a new trial on the ground of surprise. Even if I were wrong in that view, I do not think that the evidence which is suggested to be now available is sufficient to be likely to make any difference in the result of a new trial. There are three affidavits, one by Lord Reading, which is an affidavit one would expect from him, stating nothing more than what he absolutely remembers and is able to pledge himself to, another by the plaintiff's son, and the third by the chauffeur. [The Lord Justice then referred to the affidavits, and came to the conclusion that a new trial should not be granted.]

WARRINGTON L.J. I am of the same opinion and for the same reasons.

SCRUTTON L.J. [After dealing with the other questions, and saying that the question as to the date of the first interview was a minor issue involving the credibility of the witnesses :] I now come to the only remaining matter which has given me most ground for serious consideration—namely, the question of surprise. Late on the second day of the trial it became moderately apparent that the defendant was going to say that he had made a mistake in stating that there were two interviews in February, and that there was only one. On the morning of the third day, Thursday, it became manifest that he was going to say so. The trial lasted until the Thursday in the following week. Therefore for seven days it was apparent that the defendant was changing his ground. It is said that the plaintiff was surprised by this, and that in consequence of that surprise he lost the opportunity which he would otherwise have had of giving evidence relevant to the question whether there were two interviews in February, 1915, or only one. We have seen the affidavits, and while I am not

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impressed with the strength of the evidence, it must be borne in mind that they are relevant only to a minor issue. I have no doubt the change of date came as a surprise to the plaintiff's advisers. Under what circumstances can a party, who has not at the time asked for an adjournment in order to get fresh evidence to meet this new aspect of the case, but who has gone on and taken his chance of getting a verdict on the evidence he had, be allowed to have a new trial on the ground of surprise? A certain time must be allowed for the effect of surprise to wear off. In the first excitement of surprise the party's advisers may probably not take such a clear view as they do afterwards. In a case that lasts only a day or less there is no time to appreciate the effect of a change of front. In *Hippolyte Sohm* v. *Kilsby* (1) the trial apparently lasted only a day or less. That case was tried with a common jury under Order XIV. without pleadings, and a new case was set up at the trial of which there was no trace before. The Court granted a new trial on the ground of surprise. But if the Court thinks that there was time for the effect of the surprise to wear off, so that counsel and solicitors for the party had time to realize the position, and had gone on, knowing that there was a witness in England who might give evidence—and in this case the chauffeur was in England—and not making any application for an adjournment to call him, the Court can draw no other inference than that they took their chance.

I am under the impression that there have been recent cases in which that has been said, but I cannot trace them. There is, however, an old case of *Harrison* v. *Harrison* (2), decided at a time when the remedy was to ask for a nonsuit, in which a new trial was applied for on the ground of surprise. There, the application for a new trial was founded on affidavits stating that the witnesses on the part of the defendant, who had sworn that the plaintiff acknowledged having received the money sued for, had been suborned. The Court, on ascertaining that the plaintiff, after he heard of this, went on without applying to be nonsuited, discharged the rule for a new trial.

(1) The Times, March 21, 1914.

(2) (1821) 9 Price, 89, 92.

Wood B. said: "The ground of the application was surprise. I have no doubt that the plaintiff was surprised, when the defendant proved his acknowledgment of having received money from him, for which he had not thought proper to account, and was proceeding to recover by this action. If that had not been true, he should have requested to be nonsuited, that he might have become better prepared in another action; but he chose, notwithstanding, to go on and take the chance of a verdict, by letting the case go to the jury, in the hope, perhaps, that they would disbelieve the defendant's witnesses. Now suppose we should grant a new trial: the plaintiff might again take the chance of being believed, and if not, he might apply to the Court again on the same grounds. It would become a common course on all occasions of failure, if this were to be tolerated, for a plaintiff, instead of choosing to be nonsuited, as he ought to have done in this case, for that is the only proper course, to try first what the jury will do for him, and if he should fail, he will then apply to the Court out of which the record issues, for a new trial. It is impossible to grant or listen to such an application." That expresses what I believe to be the present view, with this difference, that the plaintiff cannot apply for a nonsuit. The party has to say, "This is a complete change of front; I can get the evidence to deal with it which I could have got had I known of the change of front before; grant me an adjournment." In my view, allowing a reasonable time for the party to get over the effect of the surprise, if once he appreciates the position and goes on and takes his chance, and loses, he cannot, having taken his chance and lost, afterwards apply for a second chance so as to enable him to call those witnesses. For this reason I think that the application on the ground of surprise fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Coward & Hawksley, Sons & Chance.*
Solicitors for defendant: *Beaumont & Son.*

W. F. B.

Applied. ORR-LEWIS *v.* ORR-LEWIS. [1949] 1 All E.R. 504.

C. A.
1918
Dec. 4, 11.

[IN THE COURT OF APPEAL.]

COHEN *v.* ROTHFIELD.

[1918 C. 217.]

NEWCASTLE DISTRICT REGISTRY.

Practice—Injunction to restrain Proceedings—Concurrent Actions—Proceedings in Scotland by Defendant in England—Oppressive or vexatious Proceedings—Burden of Proof.

Two parties having cross-claims arising out of the same transactions for substantially the same relief, one commenced an action in England and the other an action in Scotland:—

Held, that in such a case the Court will not restrain the plaintiff in either action from proceeding with his action unless it is satisfied that the continued prosecution thereof would be oppressive or vexatious.

It is incumbent on the party seeking to restrain the other to show that the proceeding he complains of is oppressive or vexatious, and that the party instituting it can gain no advantage therefrom.

APPEAL from an order of Shearman J. in chambers.

The plaintiff was a registered moneylender carrying on business at Stockton-on-Tees and Newcastle-on-Tyne. In the year 1911 he employed the defendant as his agent and manager in Newcastle on the terms that the defendant should be paid one-fourth of the net profits of all business introduced and managed by him and bear one-fourth of any losses sustained on such business, and that transactions not paid off within 15 months after being entered into should, in so far as they remained unpaid, be deemed to be losses, subject to rectification of the accounts if these losses were subsequently paid. In the year 1914 the plaintiff commenced a moneylending business in Glasgow, and employed the defendant to manage that business also on the same terms as those on which he managed the business at Newcastle. In the summer of 1917 the plaintiff was prosecuted, and in November of that year he underwent a term of imprisonment until May 24, 1918. In October, 1917, he discontinued the Glasgow business, intending to retain his Glasgow customers by dealing with them from the office at Stockton. He alleged that the defendant

had taken advantage of the prosecution and imprisonment of the plaintiff to set up a business in Glasgow on his own account with the plaintiff's former customers, and that the defendant had received payments of money due to the plaintiff and commissions from the plaintiff's customers in Newcastle and Glasgow for which he had not accounted.

The defendant resided at different times, and carried on business, in Glasgow, Edinburgh, London, and Newcastle-on-Tyne, but spent the larger part of his time in Scotland. He alleged that a large sum of money was due to him as the result of his business connection with the plaintiff. He had made frequent applications to the plaintiff for a statement of the account between them. On December 29, 1917, he consulted a firm of Scotch solicitors, and a correspondence followed between this firm and the plaintiff's solicitors in Newcastle. Finally, on September 3, 1918, the defendant's solicitors wrote demanding an account within a week, failing which they said they had peremptory instructions to bring an action of accounting against the plaintiff.

On September 9, 1918, the plaintiff issued the writ in the present action claiming an account of all moneys received by the defendant as manager of the plaintiff's money-lending business at Newcastle and Glasgow, and for an account of all moneys received by the defendant as the plaintiff's agent and for payment of the amount found to be due upon the taking of such accounts and for damages for breach of duty by the defendant as the plaintiff's agent in wrongly inducing customers of the plaintiff to become his customers and for further requisite relief.

On September 14 the defendant raised his action in Scotland claiming an account of the transactions between himself and the plaintiff from September 1, 1915, and payment of the amount certified to be due on taking the account. On October 25 the position was that in the English action a statement of claim had not been delivered and that in the Scotch action the defence was due on the following day and the case would in normal conditions be heard within four weeks.

The plaintiff took out a summons to restrain the defendant

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from proceeding with the action in Scotland. In paragraph 9 of his affidavit in support of the summons he stated as follows: "The defendant has at all material times resided and still resides at Newcastle, and his sole connection with Scotland is that he now carries on a money-lending business in Glasgow, and is at his office there travelling from Newcastle for the purpose during two or three days each week. Except that I am now away as a soldier I reside at Sunderland. The books relating to my business (including that formerly carried on at Glasgow), being as far as production by me is concerned the whole of the books to be produced on taking any account, are kept at Stockton, where my principal place of business is situate. Further, a large portion of the moneys obtained by the defendant and not accounted for were obtained from Newcastle customers of my business, and to the best of my belief upon the taking of a full account it will be found that Newcastle transactions are involved as much as, if not more than, Glasgow transactions; and I say that to the best of my belief the Scotch action has not been brought bona fide, but in order to put difficulties in the way of my obtaining a full account. I am advised and believe that in this action the defendant will obtain any relief to which he may be entitled, and I respectfully submit in the circumstances that this is a case in which the Court may properly restrain the defendant from proceeding with the Scotch action pending the trial and determination of this action."

On November 20 Shearman J. made an order that the defendant be restrained until after the trial of this action or until further order from proceeding with the action for an account brought by him against the plaintiff in Scotland on September 14, 1918. He further ordered that the defendant should have leave to appeal.

The defendant appealed.

J. B. Matthews K.C. and *Zeffertt* for the appellant.

Disturnal K.C. and *Simey* (*Lowenthal* with them) for the respondent.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

Dec. 11. The following written judgments were delivered :— C. A. 1918

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SCRUTTON L.J. This is an appeal by one Rothfield, a moneylender, from an order of Shearman J. in chambers, staying Rothfield from proceeding with an action brought by him as plaintiff against one Cohen in Scotland, on the ground that its substance is included in an action brought by Cohen, another moneylender, against Rothfield in England. Cohen carried on a business as moneylender in the north of England and Scotland, and Rothfield was his manager on the terms of getting one-fourth of the profits and paying one-fourth of the losses. Rothfield demanded accounts; Cohen alleged the receipt by Rothfield of secret commissions. Rothfield, through his solicitor, threatened an action in Scotland in respect of the Scotch business if accounts were not rendered in a week. Cohen within the week issued his English writ for an account as agent and for damages for misconduct as agent. Rothfield then issued his Scotch writ for an account of the Scotch business. Rothfield has got his Scotch action to the stage when it is nearly ready to be set down for trial. Cohen has done nothing in his English action. Cohen then applied in England to restrain Rothfield from proceeding with his Scotch action on the ground that it was vexatious, and Shearman J. granted him an injunction and gave leave to appeal. Rothfield now appeals.

Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the Court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another Court.

Where an English Court is asked to stay an action commenced in a foreign jurisdiction—that is, one outside the British Empire—on the ground that the plaintiff in the foreign action is also plaintiff in an English action, the burden is on the person asking for relief from the English Court to satisfy it

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that the plaintiff in the foreign court cannot obtain any advantage from the foreign procedure that he would not obtain in the English court. It is not prima facie vexatious for the same plaintiff to commence two actions relating to the same subject-matter, one in England and one abroad. The applicant must prove a substantial case of vexation resulting from the identity of proceedings, remedies, and benefits, or from the existence of some motive other than a bona fide desire to determine disputes. Within the English Courts two actions by the same plaintiff relating to the same subject-matter may be prima facie vexatious, but this prima facie case does not exist where one action is out of the King's dominions, and the Court is not necessarily aware of the advantages of the foreign procedure. This appears to be the result of the judgments in *McHenry* v. *Lewis* (1) and *Hyman* v. *Helm*. (2) Where the plaintiff in the foreign action is not plaintiff, but defendant, in the English action, the case against interference is even stronger, for the person to be stayed has not himself initiated two proceedings. He has initiated one, and has been compelled to appear in another over which he has, as defendant, no control. When Cotton L.J. in 1883 in *Hyman* v. *Helm* (2) asked if there was any case in which a defendant sued here has before decree been restrained from commencing an action abroad, no case was produced. When, in 1909, in *Vardopulo* v. *Vardopulo* (3), a similar question was asked, again no case was produced. In *In re Connolly Brothers* (4) Cozens Hardy M.R., who had asked the question in *Vardopulo* v. *Vardopulo* (3), again referred to the matter, and he then pointed out that there was one case in which a defendant had been restrained before decree. That case was *Bushby* v. *Munday* (5), in which the plaintiff, who was suing to set aside a bond alleged to have been given for a gaming debt, succeeded in restraining the defendant from suing on the bond in Scotland by proving that, owing to the superior powers of discovery possessed by the English Court, there would be more likelihood

(1) (1882) 22 Ch. D. 397.
(2) (1883) 24 Ch. D. 531.
(3) (1909) 25 Times L. R. 518.
(4) [1911] 1 Ch. 731, 745.
(5) (1821) 5 Madd. 297.

of the facts being correctly ascertained in England. While, therefore, there is jurisdiction to restrain a defendant from suing abroad, it is a jurisdiction very rarely exercised, and to be resorted to with great care and on ample evidence produced by the applicant that the action abroad is really vexatious and useless.

Does the same rule of procedure apply where the action to be stayed is not abroad but in another court in the King's dominions, as in Scotland, Ireland, or the Colonies? In *McHenry* v. *Lewis* (1), though it was not necessary to decide the question, Jessel M.R. expressed the view that in the case of the same plaintiff bringing two actions in two parts of the Empire, as there were facilities for enforcing the English judgment in other parts of the Empire, the case was more like concurrent actions in the same jurisdiction, though, as he pointed out, if the remedies were different, the case altered. It is obvious, for instance, that an action in South Africa, where the Dutch procedure prevails, in Mauritius or Quebec, where French procedure exists, in Malta with its peculiar law, or in Scotland with its Roman procedure, may produce quite different results from an English action. It appears to me that unless the applicant satisfies the Court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's dominions, the Court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control. The principle has been repeatedly acted upon. Thus on similar grounds the Court has declined to stay proceedings in Scotland in *In re Derwent Rolling Mills Co.* (2), in which case it was pointed out that by the arrestment in Scotland the plaintiff got a charge on the property arrested taking priority from the date of the judgment and had no similar advantage in England, and also in *In re Warrand* (3), and has refused to stay an action in England, the only reason given being that proceedings were pending in Ireland between the same parties for the same relief: *Carter* v. *Hungerford.* (4) In *Jopson* v. *James* (5) the

(1) 22 Ch. D. 397, 400.
(2) (1904) 21 Times L. R. 81, 701.
(3) (1892) 93 L. T. Jour. 82.
(4) (1915) 59 Sol. J. 428.
(5) (1908) 77 L. J. (Ch.) 824.

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Court of Appeal reversed an order of the Vice-Chancellor of the Palatine Court, who had restrained a partnership action in Nova Scotia on the ground of a partnership action pending in England in his court. In *Thornton* v. *Thornton* (1) the Court refused to restrain a wife from proceeding in England for restitution of conjugal rights because her husband was already bringing divorce proceedings against her in India; and the explanation of this case given in *In re Norton's Settlement* (2) does not at all detract from its authority. In the last case, as in several of the others, the decision or discretion of the judge below was overruled.

Applying these principles to the present case, Rothfield has brought a perfectly proper action in Scotland to take the accounts of a business carried on in Scotland, and by arrestment has obtained a charge on certain funds. He announced his intention of bringing this action before Cohen commenced his action in England, and has prosecuted it with much greater diligence than Cohen has in England. Cohen gives no evidence to show that Rothfield will obtain no advantage by the Scotch action, and, so far as the English action relates to Scotch affairs, the evidence can more easily be taken in Scotland than in England. In my view the applicant did not in any way support the burden imposed on him by the principles I have stated, and on those principles there was no evidence which justified Shearman J. in staying the defendant from proceeding with his action in Scotland. His order must be set aside, and the appeal allowed with costs here and below.

EVE J. This is an appeal from an order of Shearman J. made on November 20, whereby he restrained the defendant until after the trial of this action or further order from proceeding with an action brought by him against the plaintiff in Scotland on September 14, 1918. To restrain a man from proceeding with an action which prima facie he has a right to bring and prosecute is, as was pointed out by Fletcher Moulton L.J. in *In re Connolly Brothers* (3), a very serious thing, but

(1) (1886) 11 P. D. 176. (2) [1908] 1 Ch. 471.
(3) [1911] 1 Ch. 731, 746.

it is not disputed that there is jurisdiction to make the order, the basis of the jurisdiction being that it is a jurisdiction in personam and has nothing to do with any conflict between the tribunals: *Bushby* v. *Munday*. (1) The question then arises in what circumstances and upon what principle does the Court act in exercising this jurisdiction in cases where, as in this case, it is invoked on the ground that another action between the same parties and for substantially the same relief is already instituted. Broadly speaking, I think the answer is that the Court will exercise the jurisdiction where the circumstances are such as to satisfy it that continued prosecution of both actions would be oppressive or vexatious. In each case therefore it becomes necessary to examine the particular circumstances with a view to ascertaining whether the answer to the question I have stated should be in the affirmative or negative, always bearing this in mind, that it is incumbent on the party who invokes the jurisdiction to satisfy the Court of the existence of a state of things justifying its exercise.

The litigation with which we have to deal relates to the mutual obligations of the plaintiff and defendant under two verbal agreements come to in 1911 and 1914 for the carrying on of a money-lending business first at Newcastle-on-Tyne and afterwards at Newcastle and Glasgow. The agreements were, I gather, made in England, and both parties are resident in this country, though the defendant says he resides also in Glasgow and Edinburgh. Prima facie the agreements appear to disclose a partnership at will. Disputes having arisen between the parties as to the state of accounts between them, the defendant in August, 1918, put the matter in the hands of some Scotch solicitors, who, failing to obtain the account they were demanding from the plaintiff, wrote on September 3 that, failing their getting an account within one week, they had peremptory instructions from the defendant to bring an action of accounting against the plaintiff. A few days after the receipt of this letter, and within the week, the plaintiff commenced this action wherein, putting it shortly, he claims a full account against the defendant as manager of the business at

(1) 5 Madd. 297, 307.

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Newcastle and Glasgow and damages for alleged breaches of duty as such manager. By this it would appear that the plaintiff construes the agreement as one between principal and agent and not as a contract of co-partnership. To this writ the defendant responded by the institution on September 14 in a Scotch court of proceedings in which he claims an account of the transactions between him and the plaintiff from September 1, 1915, and payment of what, on taking the account, shall be certified to be due. There is nothing in the materials before us to show why the defendant has limited his claim to an account as from September, 1915, only.

The grounds upon which the plaintiff founds his claim for the injunction are stated in paragraph 9 of his affidavit in the following terms. [The learned judge read paragraph 9 of the plaintiff's affidavit, and proceeded:] To these may be added the obvious contentions that the Scotch proceedings were commenced with knowledge of the English ones, that the relief claimed in each case overlaps, and that a judgment as claimed in the Scotch action would not really determine finally the rights of the parties unless there have been accounts stated between them down to September, 1915, of which there is no evidence. In my opinion these considerations are quite insufficient to warrant us in restraining the defendant from prosecuting the Scotch action. There is nothing to show, and I am not prepared to assume, that the plaintiff cannot, by appropriate procedure in that action, enlarge its scope so as to cover the whole period over which he claims that the accounts ought to be taken, or that he cannot, by counterclaim therein, assert his right to recover damages for breach of duty. It is true that the Scotch action was commenced after notice of the English action, but the precedence of the latter has to some extent been discounted by the superior diligence which has been exhibited in pressing on the former, and, in the absence of any evidence to prove that the defendant can obtain no advantage by suing in Scotland, I do not think we are justified in assuming that no such advantage exists. The case made by the plaintiff in my opinion falls far short of establishing that the further prosecution of the Scotch action will be

oppressive or vexatious. Indeed, a perusal of the correspondence leaves on my mind the impression that the plaintiff commenced his own action to postpone the rendering of the account, and I do not think his subsequent procedure is calculated to remove that impression.

I therefore think the order of Shearman J. ought to be discharged.

Appeal allowed.

Solicitors for appellant: *Lazarus & Son.*

Solicitors for respondent: *Thorowgood, Tabor & Hardcastle for Blackett Gill, Newcastle-on-Tyne.*

W. H. G.

BOWYER, PHILPOTT & PAYNE, LIMITED, APPELLANTS *v.* MATHER, RESPONDENT. 1918 *Dec.* 11.

Public Health—Unsound Meat—Proceedings to recover Penalty—Authority of Officer to institute—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 253, 259.

By the Public Health Act, 1875, s. 253: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General." Sect. 259: "Any local authority may appear before any court, or in any legal proceeding by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act":—

Held, that the authority required by s. 259 of the Public Health Act, 1875, must be given by the local authority to their officer or member before proceedings are instituted, and cannot be given subsequently by the local authority passing a resolution purporting to confirm what their officer has done in instituting proceedings.

CASE stated by justices of the county of Wilts.

An information or complaint was preferred by the respondent

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against the appellants under s. 117 of the Public Health Act, 1875. (1)

Upon the hearing of the information or complaint on May 23, 1918, the following facts were proved: The respondent, who was the inspector of nuisances of the Urban Council of Trowbridge, on May 17, 1918, examined the carcase of a pig which was deposited for the purpose of preparation for sale on the appellants' premises, and which was intended for the food of man, and which appeared to him to be unsound. He accordingly seized and carried away the carcase in order to have the same dealt with by a justice, who ordered it to be destroyed. On the same day the respondent laid this information or complaint against the appellants.

On May 22, 1918, a meeting was held of the Committee

(1) Public Health Act, 1875, s. 116: "Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase . . . . exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man . . . .; and if any such animal carcase . . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sect. 117: "If it appears to the justice that any animal carcase . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty. . . . "

"The justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place."

Sect. 253: "Proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the consent in writing of the Attorney-General. . . . . "

Sect. 259: "Any local authority may appear before any court, or in any legal proceeding by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act."

of the Urban Council, and at that meeting the action of the respondent in instituting these proceedings was approved and confirmed.

Evidence was submitted that the practice of the corporation of the City of Bath in similar cases some sixteen years ago was for the inspector of nuisances to institute proceedings of his own initiation and to obtain confirmation of his action from the sanitary authority or the appropriate committee.

On the part of the appellants it was contended (inter alia) that the respondent had no authority to institute the proceedings, and that the confirmation of the action of the respondent at the meeting held on May 22 did not cure the defect which was alleged to exist.

On the part of the respondent it was contended (inter alia) that the question of the inspector's authority could no longer be challenged at the time when the point was raised; that the institution of the proceedings took place at the hearing when the clerk of the Council took charge of the proceedings; and that if any initial defect existed it was cured by the confirmation at the meeting of May 22.

The justices were of opinion that the respondent, as an officer of the Council, had authority to institute the proceedings, and that if not, the confirmation at the subsequent meeting cured any defect. They held that the carcase was on May 17, 1918, in the possession of the appellants and deposited on the appellants' premises for the purpose of preparation for sale, and was intended for the food of man, and was unsound, and they ordered the appellants to pay a penalty of 20*l*.

Bartley, for the appellants. The conviction was bad because the respondent at the time the proceedings were instituted had no authority either general or special to institute them. Proceedings taken by local authorities to recover penalties under the Public Health Act, 1875, can, under s. 259, only be instituted by the clerk or by "any officer or member authorised generally or in respect of any special proceeding by resolution of such authority." The laying of the information and not

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the service of the summons constitutes the institution of a prosecution: *Beardsley* v. *Giddings* (1); *Thorpe* v. *Priestnall.* (2) The action of the respondent was confirmed on May 22 after the proceedings had been instituted, but that was too late, as there could be no confirmation of the respondent's action. In *Thorpe* v. *Priestnall* (2), which was a prosecution for an offence under the Sunday Observance Act, 1676, the consent in writing of the chief constable to institution of the prosecution required by the Sunday Observance Prosecution Act, 1871, was not given till after the information was laid and the summons issued, and it was held that the conviction was therefore bad. The respondent could seize unsound meat and take it before a justice in order to get it destroyed without any authority, but he could not proceed against the offender to recover a penalty under s. 117 unless he had been authorized by the local authority either generally or in respect of the special proceeding to institute such proceeding. *Firth* v. *Staines* (3) and *Rex* v. *Chapman* (4), where it was held that the act of a committee in giving a notice to abate a nuisance could be ratified by the sanitary authority, can be distinguished as the language of the statute there in question, was very different from the statute in the present case. The decision in *St. Leonard Vestry* v. *Holmes* (5) is much more in point.

The respondent was not represented.

DARLING J. In my opinion the respondent had a right to seize the carcase in order to have it condemned by a justice and destroyed. That is a matter which has to be done at once if the carcase is not to become a danger to the neighbourhood. But the Public Health Act, 1875, provides that proceedings for the recovery of penalties shall not be taken unless there is a well-considered case against the offenders. [His Lordship read ss. 253 and 259, and continued:] The local authority by virtue of s. 253 had the power to take these proceedings, provided they were instituted by some one authorized generally

(1) [1904] 1 K. B. 847.
(2) [1897] 1 Q. B. 159.
(3) [1897] 2 Q. B. 70.
(4) [1918] 2 K. B. 298.
(5) (1885) 50 J. P. 132.

or in respect of these special proceedings by resolution of the authority in accordance with the provisions of s. 259. But so far as appears from the case the local authority had not authorized any one to institute such proceedings. At the time they were instituted no one was authorized to institute them. They were instituted by the respondent, an inspector of nuisances, and it has not been shown that he was authorized by the local authority either generally or specially before the proceedings were instituted to institute them. After the proceedings had been instituted, however, and while they were pending, a committee of the local authority passed a special resolution confirming what the respondent had done. In my opinion that resolution was not sufficient to authorize the institution of the proceedings. There never was such an authorization of the institution of the proceedings as is required by s. 259. It seems to me that authority to institute proceedings within the meaning of s. 259 cannot be given subsequently to the proceedings being instituted by a confirmation of what has already been done. If a subsequent confirmation were permissible, then in the event of the failure of the proceedings the local authority might not confirm them, and as the proceedings in that case would not be authorized the person proceeded against would only have the officer who instituted the proceedings to look to for his costs; whereas in the event of the proceedings being successful the local authority might confirm them and proceed to enforce payment of the costs. In my opinion the local authority must authorize their officer either generally or by special resolution beforehand with regard to any proceedings for the recovery of penalties which they may desire to take. No difficulty will be caused by this decision because a local authority can give a general authority to their officer to institute such proceedings. The appeal must therefore be allowed.

AVORY J. I am of the same opinion. I regret that there has been no appearance for the respondent, because we are left to infer from the way in which the case is stated a fact which may be very material. I think, however, that we are

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justified in inferring that nothing in the nature of a general authority had been given by the local authority to the respondent. The existence of such a general authority is inconsistent with the contentions put forward on behalf of the respondent in the case, and also with the fact that at the hearing the respondent submitted evidence that a practice similar to the one adopted in the present case had prevailed in the city of Bath sixteen years ago. It is impossible to suppose that that evidence would have been relied upon if any better point could have been taken. We are therefore justified in inferring that no general authority had been conferred upon the respondent. It follows that these proceedings were not instituted by virtue of the authority required by s. 259 of the Public Health Act, 1875. It is important to notice that this authority is only required where proceedings are taken under s. 253 for the recovery of a penalty, and that there is no interference with the jurisdiction of an inspector of nuisances to seize unwholesome food and to take proceedings to get it condemned.

I should like to add with reference to *Rex* v. *Chapman* (1), which case might have been relied upon for the respondent if he had been represented here, that in my opinion the present case is very much more like *St. Leonard Vestry* v. *Holmes* (2) than it is like *Firth* v. *Staines* (3), upon which case the decision in *Rex* v. *Chapman* (1) really proceeded. In *St. Leonard Vestry* v. *Holmes* (4) Day J. said: "I think in this case the magistrate was quite right, and that the notice given by the inspector was utterly bad. There is nothing to show that the vestry ever gave any authority to order these particular works to be done, so as to comply with the 81st section of the Act. It is important that the vestry should exercise a discretion in each case, and it is not enough that the inspector does what he pleases, and then relies on his acts being afterwards approved by the vestry." Those words appear to me to be applicable to the present case, having regard to the language of ss. 253 and 259. The appeal must therefore be allowed.

(1) [1918] 2 K. B. 298.
(2) 50 J. P. 132.
(3) [1897] 2 Q. B. 70.
(4) 50 J. P. 134.

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SALTER J. I am of the same opinion. Sect. 253 of the Public Health Act, 1875, shows a clear intention on the part of the Legislature that proceedings for the recovery of penalties should not be lightly instituted. Reading that section with s. 259 it is clear that the words in the latter section "officer or member so authorised shall be at liberty to institute and carry on any proceeding," must be confined to a case where the officer has received authority before the proceedings are instituted.

Appeal allowed.
Conviction quashed.

Solicitors for appellants: *Gedge, Fiske & Gedge, for Beavan & Compton, Bradford-on-Avon.*

R. F. S.

[IN THE COURT OF APPEAL.]

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CURTIS & SONS *v.* MATHEWS.

[1918 C. 751.]

Insurance—Damage by Fire caused by "war, bombardment, military or usurped power"—Rebellion in Ireland—Warfare between Forces of the Crown and "usurped power"—Bombardment by Crown Forces—Fire caused thereby—Damage to insured Premises.

The plaintiffs' premises in Dublin and the contents thereof were insured by a policy which covered loss and damage "directly caused by war, bombardment, military or usurped power or by aerial craft (hostile or otherwise) . . . . and fire . . . . directly caused by any of the foregoing, whether originating on the premises insured or elsewhere." The policy contained a proviso that no claim was to attach for "destruction by the Government of the country in which the property is situated." During the currency of the policy certain persons, styling themselves a Provisional Government, proclaimed an Irish Republic and occupied with armed forces the General Post Office and other public buildings in Dublin. The General Post Office was bombarded by the military forces of the Crown with shell, and as a result it caught fire. The conflagration spread, and destroyed the plaintiffs' premises and their contents. In an action on the policy:—

Held, that the plaintiffs' loss was caused, not by a mere riot or civil commotion, but by civil strife amounting to warfare; that the policy covered loss from fire caused by a bombardment carried on by the forces of the Crown; that the proviso only applied to the intentional destruction of property by the Government; and that the plaintiffs' loss was therefore recoverable under the policy.

Judgment of Roche J. [1918] 2 K. B. 825 affirmed.

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CURTIS & SONS v. MATHEWS.

APPEAL from the judgment of Roche J. in an action tried without a jury, reported [1918] 2 K. B. 825.

The plaintiffs claimed a loss under a policy of insurance dated March 23, 1916, and subscribed by the defendant and others, underwriters at Lloyd's. The policy was expressed to be for "24,500*l.* part of 31,555*l.* on buildings and contents, as per fire specification, of premises situate:—98, 99, Middle Abbey Street, Dublin, against risks as per clause attached hereto." The attached clause was in the following terms: "W. and B. clause. This policy is to cover the risk of loss and/or of damage to the property hereby insured directly caused by war, bombardment, military or usurped power, or by aerial craft (hostile or otherwise), including bombs, shells, and/or missiles dropped or thrown therefrom, or discharged thereat, and fire and/or explosion directly caused by any of the foregoing, whether originating on the premises insured or elsewhere. No claim to attach hereto for delay, deterioration, and/or loss of market, or for confiscation or destruction by the Government of the country in which the property is situated, or for breakage of glass due to concussion. Only to pay hereon if not recoverable under any other existing policy of insurance."

The facts as stated by Roche J. in his written judgment were as follows:—"The premises 98 and 99, Abbey Street, were within 100 yards of the General Post Office in Sackville Street, Dublin. On Easter Monday, April 24, 1916, certain persons styling themselves a Provisional Government proclaimed an Irish Republic, and, apart from some operations in other parts of Ireland, occupied with armed forces, estimated at some 2000 men, various public and other buildings in Dublin, and amongst them the General Post Office. The military forces of the Crown thereupon took action, and, after house and street fighting lasting until Saturday, April 29, the inevitable collapse occurred and the Provisional Government and its followers in arms unconditionally surrendered. In the course of the week the General Post Office was bombarded from both north and south by the military forces of the Crown using 18-pounder field guns. On Friday, April 28, during, and as I hold by reason of, the bombardment of the General Post Office with

common shell a conflagration broke out there, spread across Princes Street by means of a highly inflammable barricade constructed by the insurgents out of motor cars and bicycles, and attacked the Hotel Metropole, and then spread backwards from the Sackville Street frontages until by the evening of Saturday, April 29, it had reached and virtually destroyed the buildings and contents on the plaintiffs' premises. The fire brigade had checked, and indeed extinguished, some outbreaks of fire in the city, but they were unable to cope with this outbreak, because, although they arranged with the Government for a temporary suspension of military operations on its side, the firemen were fired upon from the insurgents' side and compelled to desist from the work of extinction. But for this I think the plaintiffs' premises would in all probability have escaped destruction."

Roche J. held that the plaintiffs' loss was caused, not by a mere riot or civil commotion, but by civil strife amounting to warfare; that the policy covered loss from fire caused by a bombardment carried on by the forces of the Crown; that the proviso only applied to the intentional destruction of property by the Government; and that the plaintiffs' loss was therefore recoverable under the policy.

The defendant appealed.

Mackinnon K.C. and *D. M. Hogg K.C.* (*Patrick Hastings* with them) for the defendant. The defendant does not dispute the finding of fact by the learned judge as to the cause of the fire. The first contention is that the loss was not caused by "military or usurped power" within the meaning of the policy. The disturbance which caused the loss was merely a riot or civil commotion, neither of which is covered by the policy. In *Langdale* v. *Mason* (1) Lord Mansfield directed the jury as to the meaning of the words "civil commotion" and "military or usurped power" in a policy of insurance. To constitute military or usurped power there must be an organized force with a head directing the force and usurping the powers of the Government. Rebellion is usurped power. The riot here at the time of the loss amounted merely to civil commotion. It

(1) (1780) 2 Park on Marine Insurance, 8th ed., vol. 2, p. 965.

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might have assumed the garb of usurped power later on if it had not been checked. The reality and not the pretence of the commotion must be looked at. In *Drinkwater* v. *London Assurance Corporation* (1) Wilmot C.J. said that the words "burnt by usurped power" meant "burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it." In that case the fire was caused by mob riots.

Secondly, the words "war, bombardment, military or usurped power" refer to foreign enemies and not to an internal commotion. This is made clear by the succeeding words "aerial craft (hostile or otherwise)," which show that where it is intended to include damage caused by weapons which are not enemy weapons it is expressly included. Damage caused by British engines of war is not included except in the specially provided case of aerial craft.

Thirdly, in any case the loss is excluded by the clause, "No claim to attach hereto for . . . . destruction by the Government of the country in which the property is situated." Destruction by the Government is all that is necessary to bring the loss within this clause. An intention to destroy is not necessary. But if intent is necessary, the fire was caused by the deliberate act of the Government in shelling the General Post Office. [They also contended that the judgment was for too large a sum.]

Leslie Scott K.C., *Greer K.C.*, and *R. R. Smylie* for the plaintiffs were called upon only on the question of the amount which the plaintiffs were entitled to recover.

BANKES L.J. [after discussing the items as per fire specification, and coming to the conclusion that the learned judge's judgment must be varied by reducing the amount, continued :] That leaves open that part of the appeal which has reference to the construction of the policy. The facts as found by the learned judge were that a shell fired by the military forces of the Crown at the General Post Office set the Post Office on fire, and the fire spread and eventually reached the plaintiffs'

(1) (1767) 2 Wils. 363, 364.

premises and destroyed them and their contents. The learned judge said (1): "I am satisfied that the real and immediate cause of the fire in the General Post Office was bombardment, and that the fire spread directly and naturally from the General Post Office to the plaintiffs' premises." That being the cause of the loss the question is whether the loss falls within the policy, which has been called a war and bombardment policy.

The first point taken on behalf of the defendant is that the damage to the plaintiffs' property so caused was not due to "military or usurped power," but was due to civil commotion; and counsel referred to two cases—*Langdale* v. *Mason* (2) and *Drinkwater* v. *London Assurance Corporation* (3)—where the meaning of "usurped power" was discussed. I do not propose to attempt to give a definition of what constitutes "usurped power." In this policy which we have to construe the words are "war, bombardment, military or usurped power." It does not seem to me to be very material to consider what in this clause usurped power means in view of the finding of fact by the learned judge that the damage was directly caused by the bombardment. But assuming that it is material to consider the meaning of "usurped power" I will merely say this: Usurped power seems to me to mean something more than the action of an unorganized rabble. How much more I am not prepared to define. There must probably be action by some more or less organized body with more or less authoritative leaders. Beyond that it is not, in my view, necessary to express any opinion, because the learned judge said (1): "I am satisfied that Easter week in Dublin was a week not of mere riot but of civil strife amounting to warfare waged between military and usurped powers and involving bombardment." In that conclusion, upon the facts before him, I entirely agree.

The second point was that the words in the clause referred to damage done by some hostile act of a foreign enemy, and this contention is founded on the words which immediately

(1) [1918] 2 K. B. 829.
(2) 2 Park on Marine Insurance, 8th ed., vol. 2, p. 965.
(3) 2 Wils. 363.

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Bankes L.J.

follow the part of the clause which deals with bombardment and military or usurped power—namely, "aerial craft (hostile or otherwise)." It is said that the fact that damage by aerial craft belonging to this country is expressly mentioned in that part of the clause indicates that damage by the forces of this country was not intended to be included in the earlier part of the clause. The learned judge dealt with that contention in this way (1): "I cannot regard the insertion of words ex abundanti cautela in this later connection as altering or affecting the plain and natural construction of the words in the earlier part of the clause." I cannot express my view more concisely or more clearly, and I adopt his language as expressing my view on this contention.

It is next said that the case comes within the exception, "no claim to attach for . . . . destruction by the Government of the country in which the property is situated," because, on the findings of the learned judge, the case was one of destruction by the Government of the country in which the property was situated. It was pointed out by the learned judge that, if that contention were correct, it would be in sharp contradiction to that part of the clause which immediately precedes it in reference to damage caused by aerial craft belonging to the forces of this country, because it might well be that a bomb dropped from one of our aeroplanes might fall on the premises insured and destroy them. The learned judge was of opinion that this provision had reference to deliberate destruction, that is to say, deliberate in the same sense as confiscation, the word immediately preceding it, would be deliberate. In that conclusion I entirely agree.

In my view the construction which the learned judge placed upon this policy was correct. The appeal therefore fails subject to a reduction in the amount of the judgment. In that respect the judgment will be varied.

WARRINGTON L.J. I am of the same opinion. So far as the liability of the defendant is concerned I am quite satisfied with the judgment of Roche J. I accept it, and I have nothing to

(1) [1918] 2 K. B. 830.

add in that respect to the judgment that has been pronounced by my Lord. [The Lord Justice then dealt with the question of the amount recoverable, and agreed that the amount should be reduced.]

SCRUTTON L.J. The main contest in this case is as to the construction of this war and bombardment policy. The underwriters contend that on the true construction of the policy they are not liable for the loss. Upon this part of the case I entirely agree with the judgment of Roche J., and do not think it necessary to add anything to it. [The Lord Justice then discussed the question of the figures, and came to the conclusion that the amount must be reduced.]

Judgment varied as to amount.

Solicitors for plaintiffs: *Burton, Ranger, & Frost.*
Solicitors for defendant: *Parker, Garrett & Co.*

W. F. B.

[COURT OF CRIMINAL APPEAL.]

1919
Jan. 13.

THE KING *v.* MARKS FEIGENBAUM.

Criminal Law—Evidence of Accomplice—Corroboration—Silence of Accused when charged.

On a charge against the appellant of having incited certain boys to steal fodder, evidence was given for the prosecution by the boys and also by a police officer, who stated that he had called at the appellant's house, after the boys had been arrested for stealing the fodder, and had told him that the boys, giving their names, had informed the police that the appellant had sent them to steal the fodder, that they had stolen fodder for the appellant on other occasions, giving the dates, and that the appellant had paid them specified sums for the stolen fodder. The appellant had made no reply to this statement:—

Held, that the jury had been rightly directed that they were entitled to consider whether the appellant's failure to reply was not in the circumstances some corroboration of the boys' evidence.

APPEAL against conviction and sentence.

The appellant was tried at the London Sessions on an

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indictment which charged him (inter alia) with having incited six boys to steal horse fodder, and with having received the fodder well knowing it to have been stolen. On behalf of the prosecution evidence was given by the boys, and also by a police constable, who stated that he went to the appellant's house to arrest him, and that he said to the appellant: "I have arrested three lads to-night," mentioning their names, "whom I saw stealing from a van a sack of horse mixture, and they say you sent them out for it, and that on the previous Monday they stole a sack of horse provender and you gave them a shilling for it, and that on the Friday previous, for stealing some provender, you gave them sixpence," and that the appellant made no reply.

The deputy-chairman, in summing up, told the jury that the boys were the accomplices of the appellant, and warned the jury as to the danger of accepting the uncorroborated evidence of an accomplice; but he pointed out that the jury were entitled to consider whether the fact that the appellant had made no reply to the specific charges made against him by the constable was not some corroboration of the evidence given by three of the boys.

The appellant was convicted, and sentenced to four years' penal servitude.

Keeves for the appellant. The deputy-chairman misdirected the jury in suggesting that the fact that the appellant made no reply to the statement of the police officer was some corroboration of the boys' evidence: *Rex* v. *Tate* (1); *Reg.* v. *Cramp.* (2)

[AVORY J. referred to *Rex* v. *Christie.* (3)]

The deputy-chairman also omitted to give the jury sufficient warning as to the danger of accepting the uncorroborated evidence of accomplices: *Rex* v. *Everest* (4); *Rex* v. *Cohen.* (5)

[AVORY J. Those cases were decided before *Rex* v. *Baskerville.* (6)]

(1) [1908] 2 K. B. 680.
(2) (1880) 14 Cox, C. C. 390.
(3) [1914] A. C. 545.
(4) (1909) 73 J. P. 269.
(5) (1914) 10 Cr. App. R. 91.
(6) [1916] 2 K. B. 658.

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E. P. Clarke (*Roland Oliver* with him) for the Crown was not called upon.

The judgment of the Court (Darling, Avory, and Shearman JJ.) was delivered by

DARLING J. In this case the appellant was charged with having incited some boys to steal sacks of fodder and with having received the fodder well knowing it to have been stolen. If the evidence given by the boys was believed, it established that the appellant had incited the boys to steal the fodder and had subsequently bought it from them at a very cheap rate. But the boys were undoubtedly the accomplices of the appellant. It is a rule of law that a jury may convict on the uncorroborated evidence of an accomplice, and, therefore, a judge is not justified in directing the jury, at the close of the case for the prosecution, that they must acquit the prisoner because in his opinion the only evidence against him is the uncorroborated evidence of an accomplice. But it has been laid down in many cases that the judge ought not to leave the case to the jury without warning them firmly that the evidence of an accomplice must always be regarded with grave suspicion, and that they ought not to convict unless the evidence of the accomplice is corroborated; further, he ought to point out to the jury what corroborative evidence there is, if any, or if, in his opinion, there is no corroborative evidence, he should tell the jury so. Practically this differs little from saying that a judge may direct an acquittal if there is indeed no corroboration of the accomplice's evidence, but a difference does exist, though it may be very slight. In the words of Browning:

> "Oh, the little more, and how much it is!
> And the little less, and what worlds away."

In this case the deputy-chairman rightly directed the jury as to the danger of believing the uncorroborated evidence of the accomplices, and as to what was, or might be, corroboration; and, in our opinion, it would, in the circumstances of this case, have been wrong for him to say that in his opinion there was no corroboration of the boys' evidence. What

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Darling J.

had happened was this. After the boys had been arrested, and statements implicating the appellant had been made by them to the police, a police officer went to the appellant's house. He gave the appellant specific information as to the names of the boys, as to what they had told the police, and as to the charge against them. The appellant did not make any reply to the statement of the police officer. We are of opinion that, in these circumstances, it would be wrong to say that there was no evidence on which the jury could find that the boys' evidence had been corroborated. The deputy-chairman quite properly pointed out to the jury that the failure of the appellant to make any reply to the statement of the police officer might, having regard to the nature of the statement and to the circumstances in which it was made, be considered as being a corroboration of the boys' evidence, that it was for the jury to consider whether in their opinion it did, or did not, amount to corroboration, and, if they thought it did, it was for them to say whether they thought there was sufficient evidence on which to convict the appellant.

The appeal against the conviction will, therefore, be dismissed, but we think that the sentence ought to be reduced to three years' penal servitude.

Solicitors for appellant: *J. B. Howard & Son.*
Solicitors for the Crown: *Wontner & Sons.*

F. O. R.

BRAYBROOKS *v.* WHALEY.

1919
Jan. 14, 16.

Vendor and Purchaser—Sale by Mortgagee—"Realise any security"—Omission by Mortgagee to apply for Leave of Court—Damages—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1.

Sect. 1, sub-s. 1 of the Courts (Emergency Powers) Act, 1914, provides that "from and after the passing of this Act no person shall . . . . (*b*) . . . . realise any security (except by way of sale by a mortgagee in possession) . . . . except after such application to such Court and such notice as may be provided for by rules or directions under this Act. . . . . "

On August 3, 1917, the defendant, the mortgagee of certain land but not in possession thereof, put up the same for sale by auction, and the plaintiff agreed to buy it. Completion was to take place on October 11. Shortly after the auction it was brought to the notice of the defendant by the mortgagor that he had not obtained the leave of the Court under the above sub-section to realize his security, and on August 24 the defendant purported to annul the sale on this ground. No application was ever made to the Court under the Act of 1914. In an action by the plaintiff for specific performance or for damages for the loss of his bargain, the county court judge awarded damages beyond the return of the deposit:—

Held, (1.) that the sale was only a step towards realizing the security; (2.) that an application to the Court under the Act of 1914 could have been made at any time before the date of completion; (3.) that the defendant not having made that application was in default; and (4.) that the county court judge was entitled to award general damages to the plaintiff for the loss of his bargain.

Bain v. *Fothergill* (1874) L. R. 7 H. L. 158 distinguished.

Day v. *Singleton* [1899] 2 Ch. 320 applied.

Appeal from Spalding County Court.

The plaintiff claimed specific performance of a contract for the sale of certain land, and, alternatively, the return of the deposit of 10*l.* and 50*l.* as damages for breach of contract.

The defendant was the mortgagee of the land in question, but he was not in possession; and, apart from any question under the provisions of the Courts (Emergency Powers) Act, 1914, he had a right to sell the land. On August 3, 1917, he put up the land for sale by auction, and the plaintiff agreed to buy one lot immediately adjacent to his business premises, which he was desirous of extending. The completion was to take place on October 11. The plaintiff paid a deposit

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of 10*l.* Shortly after the auction it was brought to the notice of the defendant by the mortgagor that, not having obtained the leave of the Court under the above-mentioned Act, he had no right to sell the land. Correspondence passed between the parties, but no application was ever made to the Court by the defendant. On August 24, 1917, he purported to annul the sale on the ground of the irregularity under the Act of 1914. On October 30, or some days later, his mortgage was paid off, and thereafter this action was brought.

The county court judge found that the defendant's laches had caused serious loss to the plaintiff, and, relying on *Day* v. *Singleton* (1), he awarded damages and return of deposit, in all 50*l.*, but refused specific performance.

The defendant appealed.

Dyer and *Sandlands* for the defendant. This case comes within the principle laid down in *Flureau* v. *Thornhill* (2) and *Bain* v. *Fothergill* (3)—namely, that if a vendor of land, without fraud, is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain. Here it was by pure inadvertence that an application to the Court under s. 1, sub-s. 1 (b) of the Courts (Emergency Powers) Act, 1914, for leave to realize the security was not made before the auction, and thereafter it was too late to make the application. The sale was a realization of the security.

[Horridge J. referred to *National Bank* v. *Claffey*. (4)]

It is said that the rule in *Bain* v. *Fothergill* (3) has been qualified by *Day* v. *Singleton*. (1) There, it is true, an intending purchaser recovered damages, beyond the return of his deposit and expenses, for the loss of his bargain, but in that case the sale was not carried out by reason of the vendor's omission to get his lessor's consent; in fact, the vendor induced the lessor to refuse his consent. That was clearly a case of mala fides, and in no way affects the present case. Again,

(1) [1899] 2 Ch. 320.
(2) (1776) 2 W. Bl. 1078.
(3) L. R. 7 H. L. 158.
(4) [1917] 2 I. R. 281.

in *In re Daniel* (1), where the purchasers were held entitled to recover general damages, the ground was that the vendor had failed to do something which was within his power to do. That does not apply to the present case, where no application was possible after the auction, and where, even if it could have been made, it would have failed.

[They also contended that there was no evidence of damage sustained by the plaintiff, and that at the most he was entitled to the return of his deposit and payment of any costs to which he had actually been put in investigating the title.]

J. F. Carr for the plaintiff. The facts bring the case within the principle of *Day* v. *Singleton*. (2) The material provision of the Courts (Emergency Powers) Act, 1914, is framed on the lines of ss. 19-22 of the Conveyancing Act, 1881. The provisions of that Act restrict a mortgagee's power of sale until he has complied with certain formalities, but those formalities can be complied with at any time before completion: see *Life Interest and Reversionary Securities Corporation* v. *Hand-in-Hand Fire and Life Insurance Society*. (3) Similarly, the requirements of the Act of 1914 which, like ss. 19-22 of the Conveyancing Act, 1881, are for the protection of the mortgagor, can be complied with after the date of the contract and before completion. The sale was only a preliminary step towards the realization of the security: *National Bank* v. *Claffey*. (4) [*In re Sandow* (5) was also referred to.]

[He also contended that there was evidence of damage sustained by the plaintiff by the loss of his bargain.]

HORRIDGE J. This action is brought in respect of the alleged non-performance of a contract of August 3, 1917, made between the defendant of the first part and the plaintiff of the other part by which the plaintiff bought certain property. The contract, which was to be completed by October 11, 1917, was not in fact completed because the defendant had not obtained the requisite leave of the Court under the Courts (Emergency

(1) [1917] 2 Ch. 405.
(2) [1899] 2 Ch. 320.
(3) [1898] 2 Ch. 230.
(4) [1917] 2 I. R. 281.
(5) [1916] W. N. 262.

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Powers) Act, 1914. The plaintiff claimed specific performance of the contract and, alternatively, damages for non-performance. He was met by the defendant relying on the now well recognized rule of law laid down in *Bain* v. *Fothergill* (1), which says that where a vendor of real property is unable to complete his contract owing to a defect in his title no damages can be recovered from him by the proposed purchaser beyond the amount of the deposit and any costs he may have incurred. The plaintiff, on the other hand, contended that the case was governed by *Day* v. *Singleton* (2) and *In re Daniel* (3), which are said to qualify the rule laid down in *Bain* v. *Fothergill.* (1)

In *Day* v. *Singleton* (2) the question was whether the purchaser of leasehold property which the vendor could not assign without the licence of his lessor could recover damages (beyond the return of the deposit with interest and expenses) by reason of the vendor's omission to do his best to procure the licence. The vendor made no effort to obtain the lessor's consent to the required assignment, and the Court of Appeal held that as the vendor had not done everything in his power to obtain a proper conveyance to the purchaser, the latter was entitled to damages for the loss of his bargain. In *In re Daniel* (4) the vendors failed to redeem a mortgage affecting the property whereby the sale was prevented from being carried out. There Sargant J. said this: "The question, indeed, seems to me to be covered by the following passage in the judgment of Lord Hatherley in *Bain* v. *Fothergill* (5)—namely, 'the vendor in that case'—*Engell* v. *Fitch* (6)—'was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance.' Here I think the vendor could 'complete the conveyance,' and could compel the mortgagees to join in the

(1) L. R. 7 H. L. 158.
(2) [1899] 2 Ch. 320.
(3) [1917] 2 Ch. 405.
(4) Ibid. 410.
(5) L. R. 7 H. L. 209.
(6) (1869) L. R. 4 Q. B. 659.

conveyance within the meaning of that passage; and that mere pecuniary inability to do so forms no better defence than it ordinarily does to a claim for a breach of contract."

In this case the plaintiff said that an application could have been made by the defendant under the Act of 1914 for the sanction of the Court to the contract previously entered into, and in that way, as a matter of conveyancing, the contract could have been completed. It is said, therefore, that the principle of defective title on which *Bain* v. *Fothergill* (1) proceeded has no application, and that this case depends on the fact that the defendant took no steps to obtain the leave of the Court. The defendant never made any application to the Court under the Act, but we have to consider whether such an application could in the circumstances properly have been made. That depends upon the provisions of s. 1, sub-s. 1 (*b*), of the Act of 1914, upon which I may say no light is thrown for this purpose by the rules made under the Act. We have to see whether the section prohibits the taking of a step to realize a security by making a contract to sell the property, or whether an application may be made to the Court at any time before the complete process of realization—in this case by conveyance—is carried out. In other words, was the contract itself a "realizing of the security" before entering into which leave ought to have been obtained, or does realization mean a complete realization in the sense of a completed conveyance when the property will be conveyed and the purchase money paid? There is not very much authority to assist us. There are, however, two matters which I think help to some extent. The first is this. When considering the case of foreclosure which is dealt with by the same sub-section of the Act of 1914 with which we are now concerned, Warrington J. in *In re Farnol Eades Irvine & Co.* (2) expressed the view that the prohibition against "foreclosure" did not preclude a person from commencing a suit for foreclosure, and it was in consequence of that that the Courts (Emergency Powers) (No. 2) Act, 1916, was passed, which by s. 1, sub-s. 1, provides, inter alia, that "the provisions relating to foreclosure shall

(1) L. R. 7 H. L. 158.

(2) [1915] 1 Ch. 22.

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extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure." The second matter which I think assists us is the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which, as regards mortgages coming within the Act, provides by s. 1, sub-s. 4, that a mortgagee shall not so long as certain conditions are fulfilled " take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured." There it will be seen the sub-section deals specifically with steps towards realizing the security. In *National Bank* v. *Claffey* (1) it was held that the institution of an action of ejectment by a mortgagee was not the realization of his security contemplated by s. 1, sub-s. 1 (*b*), of the Act of 1914, but was only a step towards realizing the security, and that the leave of the Court was not necessary before issuing the writ. In that case Madden J. drew attention to the section of the Act of 1915 to which I have referred, and said he was asked to extend the principle of that legislation to the case before him, to which admittedly it did not apply. The fact, therefore, that a statute was required to say that the commencement of a foreclosure action, which was a step in the realization of the mortgagee's security, must be treated as foreclosure within the Act of 1914, and the further fact that the Increase of Rent, &c., Act, 1915, provides that not only is a mortgagee not to realize his security but is to take no step to realize it, show that the material words of the section with which we are dealing may fairly be taken to mean " completely realize any security," and do not refer to a mere step towards realizing the security. In this case the contract of sale was merely a step by the mortgagee towards realizing his security, and therefore before the realization was complete an application could have been made to the Court for its leave. The defendant made no application. It was a matter of completing his contract by conveyance, and was not a matter of title within the rule in *Bain* v. *Fothergill* (2), and therefore damages properly flowing from the breach can be recovered by the plaintiff, damages not limited to the deposit and costs of

(1) [1917] 2 I. R. 281.

(2) L. R. 7 H. L. 158.

investigating the title. It is said, however, on behalf of the defendant that there was no evidence on which the county court judge could find damages. I think there was evidence which if the case had been tried with a jury could not have been withdrawn from them, and it cannot be said that the judge was wrong in law in assessing the damages at 50*l*. The appeal must be dismissed.

SALTER J. I am of the same opinion. The county court judge gave judgment in favour of the plaintiff for general damages, not confining them to the amount of the deposit and expenses. It was contended on behalf of the defendant that the case falls within the principle of *Flureau* v. *Thornhill* (1) and *Bain* v. *Fothergill* (2), and that the judge was wrong in law in awarding these damages. In my view this case falls not within the principle of those decisions, but within that of *Day* v. *Singleton* (3) and *In re Daniel.* (4) It is an implied term of a contract for the sale of land that the vendor will do his best to convey the property to his purchaser, and the present plaintiff says that the defendant failed to make an application to the Court under the Act of 1914 after the auction and before the date of completion for leave to realize his security. The defendant meets this by saying that if such an application had been made it would have been futile because, first, it would have been too late ; and secondly, it would have failed on the merits. As to the first point, I do not think that an application made after the auction and before completion would have been too late. The sub-section in question says that a mortgagee shall not "realize any security" without the leave of the Court, but I do not think a mortgagee "realizes" his security by the sale of land until he has received the purchase money. The Act is for the protection of the mortgagor, and I fail to see any reason why a mortgagor is not sufficiently protected if an application, upon proper notice to him, is made at any time before completion. The defendant, therefore, cannot say that he was absolved from applying because it was too late. With regard to the suggestion that

(1) 2 W. Bl. 1078.
(2) L. R. 7 H. L. 158.
(3) [1899] 2 Ch. 320.
(4) [1917] 2 Ch. 405.

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e application would have failed on the merits I think that where it is alleged that damage has been caused to a person by reason of the wrongful omission of another to take some step which it was his duty to take, the onus rests upon the person in default, if he alleges that the step must have failed, to prove it. That, I think, is supported by the observations of Lindley M.R. in *Day* v. *Singleton* (1), where he said: "Singleton never asked the lessors to accept Day as their tenant without a bar, and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused." Therefore it rested upon the defendant in this case to satisfy the judge that an application to the Court for leave would have been dismissed on the merits, and it is clear that he failed to do so. There was therefore a breach of contract by the defendant which entitled the plaintiff to damages for the loss of his bargain if in fact he proved that he had sustained damage. The only part of the case upon which I have entertained any doubt is whether there was evidence before the judge upon which he could assess general damages; but upon the whole I agree that there was some evidence upon which he could find as he did. He based his decision upon *Day* v. *Singleton* (2), and in my opinion he was right in law.

Appeal dismissed.

Solicitors for plaintiff: *Oldman, Cornwall & Wood Roberts, for Major Merry, Spalding.*

Solicitors for defendant: *Law & Worssam, for English & Son, Stamford.*

(1) [1899] 2 Ch. 320, 328. (2) Ibid, 320.

J. S. H.

[IN THE COURT OF APPEAL.]

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1918
Nov. 6;
Dec. 9.

COLDMAN *v.* HILL.

Bailor and Bailee—Agistment—Theft from Bailee—Reasonable Diligence to recover—Breach of Duty—Onus of Proof.

An agister of cattle does not discharge himself of his duty as a bailee for reward by proving that they were stolen without his default, if by using reasonable diligence he could have recovered them.

If, having failed to use such diligence, he is sued for loss of the cattle, he must prove, in order to discharge himself, that such diligence would have been unavailing; it is not for the bailor to prove that it would have retrieved the loss.

A farmer accepted certain cattle for agistment. Some of them were stolen without his default. After learning that they were missing he made no effort, whether by informing the owner or the police, or otherwise, to recover them. It was doubtful whether any reasonable attempt on his part would have led to their recovery :—

Held, that he was liable for their loss.

APPEAL from the judgment of a Divisional Court (Atkin and Shearman JJ.) on appeal from the County Court of Hampshire holden at Portsmouth.

The defendant was a farmer who took in cattle for agistment on some marshes in his occupation. In the spring of 1917 the plaintiff sent seven cows, some of which were in calf, to be agisted by the defendant. No special terms were arranged. It was the duty of the defendant's stockman to go round the marshes every day and count the cattle that were grazing. On June 5 the plaintiff went and took away a cow that had calved, and he told the defendant's man that he would come again to take away two cows that were soon due to calve, and would bring two more in their place. On that day two of the plaintiff's cows were stolen from the defendant's land, and were never afterwards recovered or heard of. They were stolen without the defendant's default. On June 6, some fifteen or sixteen hours after the theft, the stockman found that the plaintiff's cows were missing, and reported the fact to the defendant, who in the mistaken and unwarranted belief that the plaintiff had himself taken the cows away, did nothing. If the plaintiff had taken them he must have done so on

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June 5. He had not replaced them by two others as he said he would. On June 7 the stockman was told that two men had been seen driving the cows away at about midday on June 5. The stockman reported this also to the defendant, who took no step to inform either the plaintiff or the police, and made no effort to trace the cows himself. Three weeks afterwards the plaintiff came to take away his two cows, and then learned for the first time that they were missing. Cattle had before this been stolen from the defendant's land, and on those occasions he had informed both the owners and the police.

The plaintiff brought an action in the county court for detinue of the cows and for negligence on the part of the defendant as a bailee for reward whereby the cows were lost. The county court judge held that the defendant was under an obligation not only to use reasonable care and diligence in keeping the cows, but to take reasonable steps to recover them, and that if he had communicated with the police when the loss was known to him, they would have been recovered. He accordingly gave judgment for the plaintiff. On appeal the Divisional Court decided that, assuming a duty on the part of the defendant to inform the plaintiff or the police that the cows were missing, there was no evidence that their loss was due to the neglect of that duty. The Court therefore directed judgment to be entered for the defendant.

The plaintiff appealed.

A. J. Ashton K.C. and *St. Gerrans* for the appellant. The Divisional Court has imposed upon the plaintiff a duty incumbent on the defendant. "In case of a loss, the onus is on the bailee to prove that it occurred through no want of ordinary care on his part": 1 Sm. L. C., 12th ed., p. 226, notes to *Coggs* v. *Bernard* (1), citing *Mackenzie* v. *Cox* (2); *Travers (Joseph) & Sons* v. *Cooper*. (3) The duty of a bailee for hire is to use reasonable care in keeping the thing bailed, so that when the bailor comes for them he may receive them: *Corbett* v. *Packington*. (4) This involves a duty to take reasonable steps

(1) (1703) 2 Ld. Raym. 909.
(2) (1840) 9 C. & P. 632.
(3) [1915] 1 K. B. 73.
(4) (1827) 6 B. & C. 268.

to recover the thing if missing. The respondent took no step at all. This was a breach of his duty. If he had informed the police the cows might or might not have been recovered. In other words, his breach of duty may or may not have led to their loss. To discharge himself he must go a step further and prove that it did not lead to the loss, and this he has failed to do.

du Parcq for the respondent. The onus of proof rested originally on the appellant. When he proved that the cows were not forthcoming the onus fell upon the respondent, who discharged it by showing that the cows were stolen without his default: *Mackenzie* v. *Cox*. (1) Then if the appellant persists, he must prove negligence of the respondent causing the loss: *Broadwater* v. *Blot*. (2) He fails to prove negligence because the duty of an agister is only to take reasonable care of the cattle, not to re-deliver them: *Corbett* v. *Packington* (3); *Turner* v. *Stallibrass*. (4) He fails to prove that the alleged negligence caused the loss, because non constat that information given to the police would have prevented the loss.

Ashton in reply. The county court judge could not have ruled as a matter of law that the respondent's duty ceased on June 5 when the cows were stolen, and that there could be no evidence of negligence after that date. The cows might have been recoverable if reasonable steps had been taken. If so, the respondent cannot say they were lost without his default: *Reeve* v. *Palmer*. (5) A bailee is bound to take reasonable means to protect his bailor's property: *Ranson* v. *Platt*. (6) The respondent made no attempt to do this. Consequently he is liable unless he proves that no reasonable efforts would have recovered the cattle.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered:—

BANKES L.J. This is an appeal from a decision of the

(1) (1840) 9 C. & P. 632.
(2) (1817) Holt, N. P. 547.
(3) (1827) 6 B. & C. 268.
(4) [1898] 1 Q. B. 56.
(5) (1858) 5 C. B. (N. S.) 84.
(6) [1911] 2 K. B. 291.

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Divisional Court reversing a judgment of the judge of the county court holden at Portsmouth in favour of the plaintiff, the present appellant. The appeal raises the question where the onus of proof ultimately lies in a case where a bailee who has been deprived of the goods entrusted to him without any fault of his own, is found to have been guilty of negligence in not taking some step which might have led to the recovery of the goods.

[The Lord Justice then stated the facts, and proceeded:] The cows were in fact stolen. The county court judge has held that they were stolen without any default on the part of the respondent. The time at which the fact that the cows were missing was first reported to the respondent is not stated, but it is clear that some 15 or 16 hours at least must have elapsed between the time when they were stolen and the time when the respondent was first told that they were missing. The thieves had consequently had plenty of time to get clear away with their booty. Whether they could, or could not, have been traced and followed, and the property recovered, is of course quite another matter, and it is in reference to this question that the point as to the onus of proof has arisen. The point was distinctly taken in the county court that if the judge found that the respondent had been guilty of negligence in not communicating with the owner, or with the police, when he found that the cows were missing, the onus lay upon him of satisfying the judge that even if he had communicated with either the owner or the police, there was not, in the circumstances, any reasonable chance of recovering the cows themselves or their value from any one who had dealt with them.

On the other hand, it was contended for the respondent that if the appellant was making a case founded on any negligence on the part of the respondent, the ordinary rule applied that the onus of proving not only the negligence complained of, but that the loss complained of resulted from that negligence, lay upon the appellant. The judgment of the county court judge does not make it clear to me what view he took upon this point. In one part of his judgment when dealing with the facts he says: "It is not of course a matter of mathematical

certainty, but in my opinion there is no reasonable doubt that if, when the cows were missing, the police had been communicated with, and prompt search made, the cows would have been recovered, and so far as it is a question of fact, I so find."

In the Divisional Court the question as to the onus of proof does not appear to have been mentioned or, if mentioned, pressed. Neither learned judge in his judgment makes any reference to the point. It appears to have been assumed that the onus lay upon the appellant, and the judgments deal only with the question whether the county court judge's finding, which I have quoted above, was justified either in fact or in law. If that was the question upon which this appeal depended I should agree with the view taken by Atkin J., that there was no evidence to support any finding of fact on this point. The argument for the appellant in this court was practically confined to the question of the onus of proof, and was in substance the same as that addressed to the county court judge.

I have felt some difficulty in coming to a conclusion upon this question, and as I read the authorities, I cannot find that this precise point has ever been raised or decided. The books contain decisions dating back to very early times which deal with the law of bailment and with the degree of care which is required of a voluntary bailee and of a bailee for reward, and of the duty of a bailee, when called upon to redeliver the goods, to give satisfactory evidence, if the goods cannot be produced, that it is owing to no fault of his, and with the question upon whom the loss is to fall if the goods perish, while in the bailee's custody, from some unexplained cause, and in many instances with the precise duty under which the bailee rests in the particular circumstances of some particular bailment. All these cases, however, so far as I have been able to ascertain, relate to the period during which the goods are in the custody or control of the bailee.

The general duty of the bailee for hire appears to be extremely well put by Lord Halsbury in the unreported case of *Morison* v. *Walton* (1) in the House of Lords, which is quoted by Buckley

(1) Unreported, May 10, 1909.

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L.J. in his judgment in *Travers (Joseph) & Sons* v. *Cooper*. (1) He says: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to shew that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." In *Travers (Joseph) & Sons* v. *Cooper* (1) the question as to the onus of proof arose with reference to a barge which was under the custody and control of the bailee at the time of the loss.

The difficulty I have felt in the present case arises in consequence of the line of cases which from the earliest times have laid it down that a bailee is not responsible if the goods in his custody are stolen without any default on his part. In *Coggs* v. *Bernard* (2) Lord Holt says: "He is not answerable if they are stole without any fault in him." In *Kettle* v. *Bromsall* (3) Willes C.J. after referring to *Southcote's Case* (4) states the law thus: "But if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them, that is a good plea." In the case of *Searle* v. *Laverick* (5) Blackburn J., as he then was, quoted apparently with approval the language of Gibbs C.J. in the case of *Broadwater* v. *Blot*. (6) In that action, which was against an agister for losing a horse, the Chief Justice said: "All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstance which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable." I doubt whether the Chief Justice in the passage referring to particular negligence had in mind so much the question of the

(1) [1915] 1 K. B. 73, 88.
(2) 2 Ld. Raym. 909, 913.
(3) (1738) Willes, 118, 121.
(4) (1601) 4 Rep. 83, 84.
(5) (1874) L. R. 9 Q. B. 122.
(6) Holt, N. P. 547, 548.

onus of proof in relation to the question of damage as the question of the onus of proof of negligence which must be connected with the loss. I think the law still is that if a bailee is sued in detinue only, it is a good answer for him to say that the goods were stolen without any default on his part, as the general bailment laid in the declaration pledges the plaintiff to the proof of nothing except that the goods were in the defendant's hands and were wrongfully detained: *Gledstane* v. *Hewitt*, per Lord Lyndhurst. (1) As has, however, often been pointed out, the remedy of a bailor is not confined to an action in detinue. In Stephens' Commentaries, 7th ed. (1874), vol. 3, p. 432, he says: "Where upon a contract of bailment the bailor complains of a failure to re-deliver the article, the remedy is (according to the circumstances) by action of detinue, trover, on promises, or on the case for negligence." The distinction which may be drawn between these different forms of action where a question arises upon the Statutes of Limitation is pointed out by Willes J. in *Wilkinson* v. *Verity*. (2)

In the present case the appellant brought his action on the case for negligence as well as in detinue. So far as the action was founded in detinue the respondent had, I think, on the findings of the county court judge a complete defence. The appellant, however, relied upon a breach of the respondent's duty directly arising out of the contract of agistment—namely, the duty to give him notice if any of his cattle were found to be missing. The county court judge found that such a duty existed. I entirely agree with him. If the respondent recognized it as a duty, as he admitted that he did, to count the cattle every day, it must follow, I think, as a consequential duty that he must give notice to the owner if any be found missing. When, therefore, the respondent established the fact that the cows were stolen without any default on his part the onus of proof was shifted, and it rested with the appellant to prove some act of negligence connected with the loss of the cows in the sense that the loss may have been occasioned, or contributed to, by that act of negligence. That onus the

(1) (1831) 1 Cr. & J. 565, 569. (2) (1871) L. R. 6 C. P. 206, 210.

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county court judge finds that the appellant discharged. Does the onus again shift, as it undoubtedly would, if the act of negligence complained of had occurred while the cows were still in the respondent's custody and control; as, for instance, if the complaint was that no attempt had been made to rescue an animal which had got fast in a ditch; or as, for instance, if an animal had been injured by some unexplained cause; or as, for instance, if something had occurred while the animals were still in the respondent's possession, which rendered it reasonable that he should give the appellant notice of the facts, as in *Ranson* v. *Platt*? (1) I can see no sound reason why the rule should not be the same in the one case as in the other. In both cases the breach of duty arises directly out of the contract of bailment, and the case seems covered by the rule that the bailee must show that the loss of the goods was not due to any fault of his own. In such a case as the present it may be said that the goods are not lost in the sense of being completely lost, so long as they are recoverable by any reasonable act on the part of the bailee; and it is, I think, in this sense only that a loss without default on his part can be relied on by a bailee as a complete defence to an action for damages for loss of the goods.

Care must of course be taken not to extend unduly the duty of a bailee by expecting him to take action which may involve him in unreasonable expense or trouble; but no such question arises in this case. As has often been pointed out, the onus of proof in the course of a case may be constantly shifting. See per Bowen L.J. in *Medawar* v. *Grand Hotel Co.* (2) In the present case I think it shifted more than once, but ultimately it rested on the respondent; and as he did not attempt to discharge it the appellant is entitled to succeed, and the appeal must be allowed and the judgment of the county court judge restored, with costs here and below.

WARRINGTON L.J. In this case the defendant took in certain cows belonging to the plaintiff for agistment in his field. Two of them were stolen, and have not been recovered. The

(1) [1911] 2 K. B. 291. (2) [1891] 2 Q. B. 11, 23.

question is whether under the circumstances the defendant is liable for their value. The common law duty of the agister is, I think, to take care of the animals entrusted to him in order that the owner may come and take them away. This, then, was the duty so imposed upon the defendant: *Corbett* v. *Packington*. (1) The agister does not any more than any other bailee for reward insure the safety of the cattle entrusted to him, but is bound only to use ordinary care and diligence in his care of them—i.e., to act in the matter as a reasonably prudent man would act.

The material facts are that on June 5, 1917, somewhere about the middle of the day, two thieves drove the cows from the field, and they have never been recovered or heard of. The theft was in no way due to or made easier by any negligence on the defendant's part. So far, although no doubt the onus was on him to prove that the loss was not due to negligence on his part, he has discharged that onus, and if there were nothing more he would not be liable: *Mackenzie* v. *Cox*. (2)

The further facts upon which the plaintiff's claim is based are that on June 6 early in the day the defendant's stockman found that the cows were not in the field, and told the defendant so. The defendant, however, assuming, as he says, that the plaintiff had himself taken them away, made no communication to him. Next day, the 7th, the stockman received information that two men, unknown, had been seen driving the cows away, and he conveyed this information to the defendant. The defendant, however, neglected to inform the plaintiff or the police, and took no steps himself to trace the cows.

The learned county court judge held that the defendant was under an obligation not only to use reasonable care and diligence in keeping the cows but to take reasonable steps to recover them, and that, if he had communicated with the police when the loss was known to him, they would have been recovered, and he accordingly gave judgment for the plaintiff. The learned judges in the Divisional Court have come to the conclusion that, assuming a duty on the part of the defendant to communicate to the plaintiff or the police the fact that the

(1) 6 B. & C. 268. (2) 9 C. & P. 632.

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cows were missing, there was no evidence that their loss was due to the neglect of that duty, and they directed judgment to be entered for the defendant.

The plaintiff contends before us that the onus of showing that the loss arose from no fault of the defendant is not discharged by merely proving that the removal of the cows was due to no fault of his own, but that he must go further and prove affirmatively that his failure to give information did not contribute to the result. Whether the plaintiff is right or not in this contention depends to my mind on the question whether, when the fact of the absence of the cows became known to the defendant, they were completely lost. It seems to me that the duty of the agister is to take reasonable care to prevent a loss. It may well be that though the cattle are temporarily out of the custody of the agister, they are not completely lost, and he can, by taking some step which a reasonable man would take, restore them to his custody, and so prevent the completion of the loss. Such a step it would be his duty to take. But as soon as it is proved that the loss is complete and it is a question therefore not of preventing the loss but of recovering the goods, then I think the burden is cast on the plaintiff of showing that the step in question would have resulted in such recovery. In the present case I think the true position is this. By proving that without fault of his the cattle were driven off on June 5, the defendant established a prima facie case of complete loss, but then the further evidence I think showed that the defendant failed to take a step which a reasonable man would have taken, and one which, if it had been taken, might have prevented the apparent loss from becoming complete. Then this being shown, the defendant, though he had prima facie discharged the onus, has not in reality done so, and it would be on him to prove that, even if the step in question had been taken, the loss was complete. The matter being left in doubt, the onus is on the defendant to prove that the omission of the step in question would not have affected the apparent completeness of the loss: *Travers (Joseph) & Sons* v. *Cooper*. (1) This onus the defendant

(1) [1915] 1 K. B. 73.

failed to discharge, and the result is that the decision of the county court judge was right, and must be restored, and that of the Divisional Court must be reversed.

SCRUTTON L.J. This is an appeal from the decision of a Divisional Court reversing the judgment of a county court judge. The defendant received for reward as agister two cows of the plaintiff. When the plaintiff demanded them they were not forthcoming. The plaintiff thereupon sued the defendant for refusal to deliver on demand, and for negligence as agister. The material negligence alleged was that the defendant did not take any or any sufficient steps, when the absence of the cows was discovered, to find and recover them for the plaintiff, and never reported the loss to the plaintiff or to the police. [The Lord Justice stated the facts, and proceeded:] The county court judge held that the defendant's prima facie obligation was to redeliver on demand, and that he could only excuse his failure to do so by showing that he was prevented by some cause not due to the breach of his duty to take reasonable care. He further held that the failure to take any steps to inform the plaintiff or the police of the loss, or himself to inquire into it, was negligence, and he found, as a fact, that if information had at once been given the cows would not have been lost. He expresses his final conclusion thus: "His prima facie obligation was to redeliver the goods on demand, and he could only excuse his failure so to do by showing that he was prevented by some cause not due to the breach of his duty to take reasonable care. This onus he has, in my opinion, not discharged." The Divisional Court accepted the position that the defendant was guilty of a breach of duty in taking no steps to try to recover the cows, but they held that the loss could not reasonably be found to follow from this breach of duty; that such a finding was pure guessing. They therefore set aside the judgment for the plaintiff which the county court judge had directed, and entered judgment for the defendant. The plaintiff appeals.

It must be remembered that, this being an appeal from a county court, it is not open to question the judge's findings

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of fact, whether we should have arrived at them or not, unless there was no evidence on which he could reasonably so find. If he must have left the question to the jury, if there had been one, we cannot interfere with his findings.

First, what was the defendant's duty ? He was a bailee for hire, and it is clear that his duty was not that of an absolute insurer, but was to use towards the preservation of the goods entrusted to him from injury that degree of care which might reasonably be expected from a skilled agister or a reasonable man in respect of his own goods, and that obligation included not only the duty of taking all reasonable precautions to obviate risks of injury, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred: *Brabant & Co.* v. *King.* (1) This might include notifying the owner of the thing bailed of the danger. Thus in *Ranson* v. *Platt* (2) this Court held that it was the duty of a bailee, when served with a summons to deliver up the goods, to give the owner notice of the claim, "to see that the bailor's property is properly defended, or at any rate give notice to him, if possible, of proceedings hostile to his title." It cannot be contended, and indeed it was not argued, that a bailee seeing a thief leaving with the goods, or seeing bailed cattle straying on the road, or finding that cattle have recently strayed, is not bound to look for them or inform the owner. In this case the bailee, though he knew of the absence of the cattle within twenty-four hours of their departure, did nothing. He neither informed the police nor the owner, nor looked for them himself. His excuse has been already stated. It is enough to say that this evidence of negligence must have been left to the jury, and therefore we cannot in my opinion interfere with the finding of the judge that there was a breach of duty or negligence in not giving the owner or the police notice of the loss. Indeed, I should have made the same finding.

The Divisional Court have, however, held that the burden of proof that the negligence caused the loss is on the plaintiff, and that, as it is pure guesswork whether inquiries or search

(1) [1895] A. C. 632, 640. (2) [1911] 2 K. B. 291, 300, 305, 308.

would have recovered the beasts or not, he fails to sustain the burden of proof he is under. I am satisfied that this view of the burden of proof is erroneous where a bailee is sued in detinue for refusal to return goods on demand, and answers that he cannot return them because they are lost or stolen. In *Reeve* v. *Palmer* (1) Cockburn C.J., Williams and Willes JJ. agreeing, said: "It has been held from a very early time, that, where a chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand. The same principle applies where the chattel has ceased, by an act of omission on his part, to continue in his possession or custody. It cannot be permitted to the bailee, though he has done no act to dispossess himself of the article, to defend himself on the ground that he has kept it so carelessly and negligently that he no longer is in a condition to restore it to the bailor." In *Wilkinson* v. *Verity* (2) Willes J. repeated this. He said: "On the other hand, if the action of detinue is resorted to, as it may be (Com. Dig. Detinue A.), for the purpose of asserting against a person intrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it should seem that the owner is entitled to sue, at election, either for a wrongful parting with the property (if he discovers and can prove it), or to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and that, in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor." The bailee must therefore show that the goods were lost without default on his part. In *Bullen* v. *Swan Electric Engraving Co.* (3) the Court of Appeal, affirming Walton J., whose admirable discussion of the law I have found most useful, held that, while it was not necessary for the bailee to show exactly how the loss happened, it was necessary for

(1) 5 C. B. (N. S.) 84, 90. (2) L. R. 6 C. P. 206, 210.
(3) (1907) 23 Times L. R. 258.

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him to show that he had used as much care as a reasonable man would use in protecting his own chattels, and Farwell L.J. expressed the view that if *Powell* v. *Graves & Co.* (1) was correctly reported it was wrongly decided, as there no evidence was given by the bailee of any reasonable precautions having been taken to avoid loss. Further, I think it is clear that proof of loss does not mean temporary deprivation of possession so that the bailee is relieved from any further duties. I agree with the view expressed by Bankes L.J. in *Moore* v. *Evans* (2), that "mere temporary deprivation" would not in ordinary circumstances "constitute a loss," though it is not necessary that the bailee should prove "a certainty that the goods could never be recovered." A stranger without fault of the bailee opens a gate, so that cattle stray out: can it be said that they are lost, though the bailee could go out into the road and drive them back, or by going along the road inquiring, could find where they had strayed to? A thief steals the goods, and the bailee is told of the theft within half an hour. Is he excused from following the thief, or informing the police or the owner? In my view a bailee, who finds goods in his control threatened by a danger to prevent which may involve unusual exertion or expenditure outside his usual duty, must either inform the owner of the threatened danger, if he can by doing so get instructions to act, or enable the owner to act in time to avert the danger (*Ranson* v. *Platt* (3)); or, if he cannot give the owner information in time, he must act as agent of necessity on behalf of and at the expense of the owner, taking the steps which a reasonable owner would take in defence of property of the value in question: *Notara* v. *Henderson* (4), applied to carriers by land by Pollock B. in *Great Northern Ry. Co.* v. *Swaffield.* (5) See also *Sims & Co.* v. *Midland Ry. Co.* (6) The bailee, then, is in this dilemma: if he could inform the owner in time for him to do anything, he must do so. If he could not, because of the owner's absence, the bailee himself must act as agent of necessity, and inform the

(1) (1886) 2 Times L. R. 663.
(2) [1917] 1 K. B. 458, 471.
(3) [1911] 2 K. B. 291, 300.
(4) (1872) L. R. 7 Q. B. 225.
(5) (1874) L. R. 9 Ex. 132.
(6) [1913] 1 K. B. 103.

police, the most obvious thing for any owner of bulky goods to do when they have been stolen, and he hears of their disappearance within twenty-four hours of the theft. If the bailee wants to show that neither of these steps would be of any use, he must prove it. In my view there is a recent decision of this Court, which was not cited to the Divisional Court, which, however, decides the question and by which we are bound. In *Travers (Joseph) & Sons* v. *Cooper* (1) a bailee of goods had them in a barge. His lighterman left the barge unattended, and in his absence the barge was either mud-sucked—i.e., held in the mud—or caught under a projecting bolt, and in either case was flooded by the rising tide. It was extremely doubtful what exactly happened, and whether, if the lighterman had been on board, he could have prevented the loss. Pickford J. held that the burden of proof was on the bailor to show that there was negligence which caused the loss, and that as he left the matter in doubt, he failed. All the members of the Court of Appeal thought this was wrong. They took the view that it was incumbent upon the defendant, the bailee, when the goods were lost, to prove that he had taken reasonable care to keep and preserve them. As Buckley L.J. said (2): "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted." The Court support this view by an unreported decision of the House of Lords in *Morison* v. *Walton*, in which I was counsel. In that case the defendant was bailee of a boat which he undertook to tow across the Atlantic with a term in the contract that he should have a man on board. He broke his contract, and had no man on board. The boat was lost at night, and there was no evidence whether she was lost by gradual straining and leakage, or by a sudden and overwhelming wave. There was therefore no evidence whether the man, if on board, would have detected the leak and ordered the towing vessel to slacken speed, or whether he would have been

(1) [1915] 1 K. B. 73. (2) Ibid. 88.

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destroyed by the overwhelming wave without being able to do anything. The House of Lords held that the man who had, by breaking his contract, destroyed the possibility of any evidence on the subject, could not be heard to say that there was no evidence that his breach of contract caused the loss. It was his duty as bailee to prove that his breach of duty did not cause the loss, not the plaintiff's duty to show that it did. This appears to be merely an application of the principle omnia praesumuntur contra spoliatorem, under which a man who, having converted property, refuses to produce it that its exact value may be known, is liable for the greatest value that such an article could have: *Armory* v. *Delamirie* (1); *Hammersmith Ry. Co.* v. *Brand.* (2) This decision appears to me exactly to cover this case, and to show that the county court judge in his accurate and careful judgment took the right view of the legal position.

For these reasons I am of opinion that the decision of the Divisional Court should be reversed, and the judgment of the county court judge restored with costs here and below.

Appeal allowed.

Solicitors for appellant: *C. P. Fielder, Le Riche & Co. for Biscoe-Smith & Blagg, Portsmouth.*

Solicitors for respondent: *James, Mellor & Co. for E. J. Bechervaise, Portsmouth.*

(1) (1722) 1 Stra. 505. (2) (1869) L. R. 4 H. L. 171, 224.

W. H. G.

PIGNATARO *v.* GILROY.

1918
Dec. 4, 18.

Sale of Goods—Unascertained Goods—Appropriation by Seller—Implied Assent of Buyer.

Where on a sale of unascertained goods by description goods of that description and in a deliverable state are unconditionally appropriated to the contract by the seller, and the seller sends notice of that appropriation to the buyer, in the event of the buyer neglecting to reply to that notice promptly it must be inferred that he assents to the appropriation, and on the expiry of a reasonable time after receipt of the notice the property must be deemed to have passed.

APPEAL from the Middlesex County Court.

On February 12, 1918, the defendants sold to the plaintiff "140 bags of rice (130 Butterfly 10 T.Y.C.) to be taken delivery in 14 days free from date." The sale was by sample, and the particular bags that were to satisfy the contract were not then ascertained, but the plaintiff was told that 125 bags would be delivered at a wharf called Chambers' Wharf, and the remaining 15 bags at the defendants' place of business, 50 Long Acre. On February 27 the plaintiff sent a cheque for the price, and asked for a delivery order as arranged. On the following day the defendants wrote to the plaintiff enclosing a delivery order for 125 bags from Chambers' Wharf, and stating that the 15 bags were ready for delivery at 50 Long Acre. The plaintiff neglected to send for the 15 bags until March 25, when it was found that they had been stolen at some time shortly before that date. The action was brought to recover the sum of 61*l.* 10*s.*, the value of the missing rice. The county court judge found the bags in question had been stolen without any negligence on the part of the defendants, but he gave judgment for the plaintiff upon the ground that the subject-matter of the sale being unascertained goods there was no evidence of appropriation by either party with the assent of the other, and consequently the property had not passed to the plaintiff at the time of the loss.

The defendants appealed.

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E. Dale for the defendants. The defendants' letter of February 28 telling the plaintiff that the 15 bags were ready for delivery is conclusive evidence of an appropriation by the defendants, and the fact that the plaintiff had written on February 27 asking for a delivery order amounted to an authority to the defendants to appropriate, and to an assent in advance to that appropriation when made. Moreover, the plaintiff was in default in taking delivery. That fact, coupled with the knowledge that the goods had been put aside for him, amounted to a subsequent assent.

C. E. Dyer for the plaintiff. The judge below was right in holding that the property had not passed. No doubt if the buyer on being informed by the seller that goods have been appropriated to the contract writes to express his assent the property will pass: *Rohde* v. *Thwaites* (1); but there was no express assent here, and though assent may be implied, it will not be implied from mere silence.

Dale in reply.

Cur. adv. vult.

Dec. 18. The judgment of the Court (Lawrence and Rowlatt JJ.) was delivered by

ROWLATT J. This was an action for damages for non-delivery of 15 bags of rice sold by the defendants to the plaintiff. The defence was that the goods had been stolen without default of the defendants after the property had passed to the plaintiff. The county court judge held that the theft was not due to any negligence of the defendants, but he gave judgment against them on the ground that the property had not passed. The contract was held by the judge upon the evidence to be for 140 bags of rice, unascertained at the time of the sale, of which delivery was to be taken by the plaintiff in 14 days, the contract having been made on or about February 12, 1918. The contract being silent as to the time of payment, it is to be taken that this was to be against delivery. On February 20 the defendants wrote to the plaintiff stating that the 14 days were up on the following day. The

(1) (1827) 6 B. & C. 388.

plaintiff replied on February 27, sending a cheque, and asking for a delivery order as arranged. On February 28 the defendants sent a delivery order for 125 bags which were lying at the wharf of a third party, and a receipt for the cheque. With regard to the remaining 15 bags the letter reads as follows: "The bags at the above place"—meaning 50 Long Acre, from which the letter was written—"are ready for delivery, and shall be pleased if you can send for them at once as we are very short of room." The evidence was that there were only 15 bags at Long Acre, though the plaintiff did not admit this. The plaintiff did not send for the 15 bags in response to this letter, and two other letters—namely, on March 6 and March 12—asking them to do so were found by the judge to have been written and posted by the defendants, but he said it was not proved that they were received. Matters still remaining in this position, the 15 bags were stolen towards the end of March. Under the above contract it would be the duty of the sellers to appropriate the goods to the contract; and if such appropriation were assented to, expressly or impliedly, by the buyer the property would have passed. When they received the cheque for the goods and were asked for a delivery order it was right and proper for them to appropriate and place at the disposal of the buyer the goods for which he thus paid in order to effectuate a delivery or its equivalent concurrently with the receipt of the money. They did send a delivery order for the goods at Chambers' Wharf, and as to the 15 bags, told the plaintiff that they were ready, and asked that they should be taken away. It might well be contended that not only as regards the goods covered by the delivery order, but also as regards the goods at the defendants' own premises which they thus told the plaintiff were ready to be taken away in response to the plaintiff's request for a delivery order, there was an appropriation to which by asking for the delivery order the plaintiff had assented in advance. We do not think it necessary to decide this, because we think there was what amounted to an assent subsequent. If the plaintiff had replied saying that he would remove the goods the case would be precisely the same as

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Rohde v. *Thwaites*. (1) The plaintiff, however, did nothing for a month, and the question is what is the effect of that? If the goods were of the required quality it is difficult to see how the plaintiff could have dissented from the appropriation. He could not object to the place from which he was required to fetch them, because he had inspected rice lying at those premises at the time and for the purposes of this very contract. For the same reason it is not easy to see how he could have objected to their quality unless there happened to be some bags inferior to those which he had inspected. At any rate, he made no objection at all. Now it is obvious that if he made any objection he ought to do so promptly, because he could not place upon the vendors the risk involved in the continued possession of these goods, nor prolong the encumbrance of the vendors' premises. As he chose merely to say nothing for a whole month in response to an appropriation made in consequence of his own letter, we think that comes to precisely the same thing as if he had written saying he would remove them and did not. The learned judge said that there was no evidence of an appropriation with the assent of the buyer. He could only say this if he was looking for an express assent. As the assent may be implied we think that there was not only evidence of it but that it is the only inference possible upon the facts. For these reasons the appeal must be allowed, and judgment entered for the defendants. We express no opinion as to whether the proviso to s. 20 of the Sale of Goods Act would protect the defendants in this case.

Appeal allowed.

Solicitors for the plaintiff: *McKenna & Co.*
Solicitors for the defendants: *Rossiter & Odell.*

(1) 6 B. & C. 388.

J. F. C.

Applied. BOSTEL BROS., LTD. *v.* HURLOCK. [1948] 2 All E.R. 312.

BRIGHTMAN & CO., LIMITED *v.* TATE AND ANOTHER.

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[1917 C. 1368.]
[1917 C. 1890.]

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Contract—Action—Defence—Illegality—Emergency Legislation—Restriction of Building—Defence of the Realm (Consolidation) Regulations, 1914—*Regulation* 8 *E—Validity.*

Regulation 8 E of the Defence of the Realm (Consolidation) Regulations, 1914, provides that: "It shall be lawful for the Minister of Munitions by order to regulate or restrict the carrying on of building and construction work . . . . and by such order to prohibit, subject to such exceptions as may be contained in the order, the carrying on of such work without a licence from the Minister." On July 14, 1916, the Minister of Munitions in pursuance of that regulation made an Order prohibiting the commencing or carrying on of any building work without a licence, except where the total cost of the whole completed work in contemplation did not exceed 500*l.*

On June 29, 1916, the plaintiffs, who were builders, contracted to do certain building work for the defendants for a sum equal to the prime cost of materials and labour, plus 10 per cent. profit thereon. The contemplated cost of the work was about 1500*l.* On September 29, 1916, a licence for the work was granted under the above Order, subject to the condition that the total cost thereof should be 1350*l.* By December 15, 1916, work of that value had been executed but the contract had not been completely performed. No further licence was applied for or granted, and the work was carried on until its completion in April, 1917. The total cost amounted to 2671*l.* In an action by the plaintiffs to recover 1171*l.*, the balance due under the contract:—

Held, (1.) that Regulation 8 E and the Order made thereunder were not ultra vires.

Director of Public Prosecutions v. *Ford* [1919] W. N. 43 followed.

(2.) That the Order had the effect of an absolute statutory prohibition, making the further performance of the contract illegal; and that although it was the duty of the defendants or their architect to obtain a further licence, yet as the plaintiffs had carried on the work with knowledge that a further licence had not been obtained, they could not recover the balance due under the contract.

ACTION tried by McCardie J. without a jury.

The plaintiffs, who were builders, claimed 1171*l.*, the balance of an account for certain building work executed by the plaintiffs for the defendants.

The facts as stated by the learned judge in his written judgment were as follows:—

"The defendants, who are teachers, acquired in 1916 a

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property known as Little Bushey Farm, near Watford, for the purpose of carrying on their profession and of holding classes for dairy and agricultural work. The farm was old and dilapidated; repairs and alterations were needed. Hence the defendants entered into a written contract, dated June 29, 1916, with the plaintiffs whereby it was agreed that the plaintiffs should execute the work described in certain drawings and specifications for a sum equal to the prime cost of materials and labour together with 10 per cent. profit thereon. The contract provided that payment should be made upon the certificates of the architects. The contemplated value of the work at the time of the construction was about 1500*l.*, but no sum was mentioned in the agreement. Grave doubt existed, however, as to the state of the roof and flooring, and it was recognized as possible that substantial work might be required beyond that indicated in the contract. The plaintiffs commenced their contract operations shortly after the agreement was signed, and they continued them in the normal course. On July 14, 1916, however, the Minister of Munitions made the following order: 'In pursuance of the powers conferred upon him by Regulation 8 E of the Defence of the Realm (Consolidation) Regulations, 1914, the Minister of Munitions hereby orders as follows: On and after July 20, 1916, no person shall, without licence from the Minister of Munitions, commence or carry on any building or construction work, that is to say, the construction, alteration, repair, decoration or demolition of buildings, or the construction, reconstruction or alteration of railroads, docks, harbours, canals, embankments, bridges, tunnels, piers or other work of construction or engineering: Provided that where the total cost of the whole completed work in contemplation does not exceed the sum of 500*l.* and the use of constructural steel is not involved the licence of the Minister of Munitions shall not be required.' Soon after the Order was made the defendants' architects applied to the Minister of Munitions for a licence. At first the application was not favourably considered. Ultimately, however, a licence was granted. It was dated September 9, but it was not forwarded by the Ministry of Munitions to the architects until

September 29. The licence is in the following words : 'Ministry of Munitions of War. Defence of the Realm Regulations. This is to certify that in pursuance of the powers conferred upon him by Regulation 8 E of the Defence of the Realm (Consolidation) Regulations, 1914, and the Order of July 14, 1916, made thereunder, the Minister of Munitions has granted a licence to Messrs. Moscrop, Young & Glanfield on behalf of the Misses Tate and Tanner to carry on the building and/or construction work situate at Bushey Heath, particulars whereof are contained in part 1 of the schedule overleaf, but subject to the conditions specified in part 2 of the schedule overleaf. Signed C. F. Ray, Assistant General Secretary Minister of Munitions. Dated September 9, 1916.' The following are the schedules : 'Part 1. Particulars of work authorized by licence of the Minister of Munitions : to complete the renovation and extension of Little Bushey Farm at a total cost of 1350*l.* approximately. Part 2. Conditions subject to which the licence has been granted—That not more than four unskilled labourers be employed on this job at any one time. Note : The original licence is in the possession of the architects.' Shortly after receiving the licence the architects showed it to the defendants, and on October 2, 1916, they sent a copy thereof to the plaintiffs. No further licence was ever asked for or granted. The work at Little Bushey Farm proceeded until its completion in April, 1917. It proved to be expensive beyond anticipation. Wages rose, materials became more costly, and further work, including a new roof, was found necessary. As a result, the total cost amounted to the sum of 2671*l.*, including the plaintiffs' 10 per cent. profit. The whole of the work was done under the terms of the contract of June, 1916, and was performed with the approval of the defendants. The following certificates were given by the architects: September 12, 1916, 500*l.* ; November 21, 1916, 500*l.* ; January 26, 1917, 500*l.* That is a total of 1500*l.* on those three certificates. These sums were paid by the defendants either in cash or by bill of exchange. The following further certificates were duly given by the architects, and they constitute the total of 1171*l.* sued for in the action: April 21, 1917, 500*l.*; June 8, 1917, 604*l.*;

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August 23, 1917, 67*l*. The following figures may also be stated. Up to September 9, 1916, the total amount of work done was about 800*l*. ; up to September 29, 1916, 1000*l*. ; and up to December 15, 1916, 1350*l*. The defendants assert that from the middle of December, 1916, onwards the work done by the plaintiffs was outside the licence granted by the Minister of Munitions and was illegally performed."

Hugo Young K.C. and *Cassie Holden* for the plaintiffs.

Sir Ernest Pollock K.C. and *Barrington-Ward* for the defendants.

[The arguments of counsel appear from the judgment and the authorities cited are there discussed.]

Cur. adv. vult.

Jan. 15. MCCARDIE J. read the following judgment:— The plaintiffs, who are builders, bring this action to recover 1171*l*. for work done and material supplied in connection with a building belonging to the defendants. The defendants dispute their liability upon the ground that the claim of the plaintiffs is tainted with illegality, and is, therefore, unenforceable in a court of law. The arguments of counsel were full and able. [The learned judge stated the facts as above set out, and continued :] Two main points were argued before me—namely, (1.) whether the order of the Minister of Munitions dated July 14, 1916, is valid ; and (2.) whether, if valid, it operated to preclude the plaintiffs from recovering by reason of the doctrine of illegality. And, first, as to the validity of the order of July 14, 1916, Mr. Hugo Young submitted that it was ultra vires the Minister of Munitions. [The learned judge referred to Regulation 8 E of the Defence of the Realm (Consolidation) Regulations, 1914, under which the order purported to have been made, and to s. 1, sub-s. 1 (*e*) of the Defence of the Realm Act, 1914 (5 Geo. 5, c. 8), and held, following the decision of the Divisional Court in *Director of Public Prosecutions* v. *Ford* (1) that Regulation 8 E and the order of July, 1916, made under it were intra vires and valid. The judgment then continued as follows :]

(1) [1919] W. N. 43.

I must now consider whether the rules of law as to the effect of illegality prevent the plaintiffs from recovering in this action. The defence raised will, if successful, enable the defendants to retain without payment work and materials to the value of 117*l*. I cannot, however, unduly regard the question of hardship to the plaintiffs. In *Holman* v. *Johnson* (1) Lord Mansfield used the following words: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: Ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." Where a plaintiff has acted in disobedience to a statute it matters not whether or no the statute expressly declares the act or conduct to be void or whether it contains words of express prohibition. In *De Begnis* v. *Armistead* (2) Tindal C.J. said: "The principle by which the present case is to be decided is that which is very clearly expressed by Holt C.J. in *Bartlett* v. *Vinor* (3): 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.' The same principle is more briefly expressed by Lord Ellenborough in the case of *Langton* v. *Hughes* (4): 'What is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action.'"

The principle just stated has been firmly applied by the Courts. In *Bensley* v. *Bignold* (5) it was held that a printer

(1) (1775) 1 Cowp. 341, 343.
(2) (1833) 10 Bing. 107, 110.
(3) (1692) Carth. 251, 252.
(4) (1813) 1 M. & S. 593, 596.
(5) (1822) 5 B. & Al. 335, 341.

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could not recover for printing pamphlets on which he had failed to place his name and abode as required by 39 Geo. 3, c. 79. Incidentally, Best J. made the following statement in that case: "The distinction between mala prohibita and mala in se has been long since exploded. It was not founded on any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the State." In *Forster* v. *Taylor* (1) it was held that a plaintiff could not recover the price of butter sold by him, which was supplied in firkins not branded as required by 36 Geo. 3, c. 86. In *Cundell* v. *Dawson* (2) it was held that a plaintiff could not recover for coals supplied but which had not been weighed and in respect of which weight tickets had not been given pursuant to 1 & 2 Vict. c. ci. In *Stevens* v. *Gourley* (3) it was held that a builder could not recover for work done and materials supplied under a contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122). In that case Erle C.J. said: "It appears to me that the ultimate contract which was come to between these parties was for the erection of a building known to the plaintiff to be—or whether known to him or not, at all events it was—in violation of the Metropolitan Building Act, 18 & 19 Vict. c. 122"; and later on he says: "Upon the whole, I think this was a contract for the erection of a fabric or structure in violation of the statute; and that, the parties being in pari delicto, potior est conditio defendentis." I merely mention the cogent application of the doctrine of illegality which is shown in the decisions under the Money Lenders Act, 1900. See, for example, *Victorian Daylesford Syndicate* v. *Dott* (4) and *Bonnard* v. *Dott*. (5)

The cases above cited illustrate the wide stretch of the

(1) (1834) 5 B. & Ad. 887.
(2) (1847) 4 C. B. 376.
(3) (1859) 7 C. B. (N. S.) 99, 106, 108.
(4) [1905] 2 Ch. 624.
(5) [1906] 1 Ch. 740.

rules which affect the legality of contracts, and it is important to recall them at the present day when the tentacles of unlawfulness have been placed by Defence Regulations and Orders on so many branches of industrial life.

There is, however, a class of cases to which Mr. Hugo Young referred in his argument. They may be described as revenue cases. I take *Smith* v. *Mawhood* (1) as an example. There it was held that a tobacco dealer could recover for goods sold although he had omitted to paint up his name on the licensed premises as required by 6 Geo. 4, c. 81, s. 25. But it is essential to remember the ratio of the decision. Parke B. says: "I think the object of the Legislature was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. If it was, they certainly could not recover, although the prohibition were merely for the purpose of revenue. But, looking at the Act of Parliament, I think its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purposes of the revenue. The plaintiffs, therefore, would be entitled to recover upon their contract." The respective plaintiffs recovered in *Johnson* v. *Hudson* (2); *Brown* v. *Duncan* (3); and *Wetherell* v. *Jones* (4), upon the ground that the revenue enactments in question aimed at revenue objects only, and did not purport, either expressly or by implication, to invalidate contracts. See those cases explained by Littledale J. in *Forster* v. *Taylor*. (5) In every case it is a question of construction as to whether the object of a revenue statute is merely to protect and increase the revenue by enforcing penalties against a trader who does not comply with the rules or to render the contracts entered into by the trader illegal. See Smith's Leading Cases, 12th ed., vol. 1, pp. 432, 433. The distinction between the two classes of cases I have mentioned is lucidly stated and illustrated by Sir Frederick Pollock in his treatise on Contract, 8th ed., pp. 310–312.

(1) (1845) 14 M. & W. 452, 463.
(2) (1809) 11 East, 180.
(3) (1829) 10 B. & C. 93.
(4) (1832) 3 B. & Ad. 221.
(5) 5 B. & Ad. 898.

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In the present action the order of July 14, 1916, and Regulation 8 E have nothing to do with revenue affairs. They deal with matters which touch the public safety and the defence of the realm. The prohibition is absolute—unless a licence be obtained. It applies to all. The words are clear in their statement that no person shall build or construct unless he obtains permission from the Minister of Munitions. It is not, as Mr. Hugo Young suggested, a mere suggestion or direction. It is equivalent to a statutory interdiction supported by serious penalties. The plaintiffs here seek to recover for work done in violation of a statutory order which has the operative effect of a parliamentary enactment. Upon the principles I have stated, they are prima facie disabled from receiving the assistance of the Court.

But in the course of his most able and ingenious argument, Mr. Hugo Young sought to save his clients from the operation of the doctrine of illegality by two contentions. In the first place, he submitted that it was the duty of the defendants or their architects to procure the necessary licence and that they could not rely on their own omission to obtain it as a ground of defence. I think that Mr. Hugo Young is right in saying that prima facie the duty rested on the defendants to secure the requisite permission. They were the building owners. They initiated the building contract with the plaintiffs. It was upon their premises that the building operations were performed. The case here differs greatly from *Brandt & Co.* v. *Morris & Co.* (1), where upon a contract of a sale of aniline oil for export the Court of Appeal held that the obligation fell upon the buyers and not upon the sellers to secure the required permit. The ratio of that decision does not aid the defendants in the present case. I think, moreover, that if the default was that of the architects it must be treated as the default of the defendants, inasmuch as the architect must be regarded as the agent of the defendants with respect to such a matter as procuring the grant of any necessary licence. For some purposes, as, for example, the grant of certificates, an architect under such a contract as that before me will be treated as a quasi arbitrator. See *Chambers* v.

(1) [1917] 2 K. B. 784.

Goldthorpe. (1) But in other matters an architect is the agent of the building owner; and, in the present case, the defendants' architect admitted that the duty lay upon the defendants or himself rather than upon the plaintiffs to procure the necessary licence. Inasmuch, therefore, as the absence of a licence was due to the default of the defendants or their agent, Mr. Hugo Young relied on a dictum of Lord Denman C.J. in *Levy* v. *Yates*. (2) There the defendant, who was an actor, agreed to perform at the plaintiff's theatre. The defendant then refused to carry out his contract on the ground that the plaintiff's theatre was unlicensed. It was held that the objection was good and that the plaintiff could not enforce the contract. In the course of his judgment Lord Denman said: "The plea shows that this agreement could not be carried into effect without a contravention of the law. The question which party was to procure the licence does not arise. If it were the defendant's duty, he could not take the objection. But the plea alleges that neither could procure a proper licence, and that the plaintiff had notice of this before the agreement. And by the terms of the Acts it is plain that neither could procure a licence." In that case, however, the contract was executory when the defendant refused to carry it out. If a licence could in law have been obtained, and if it was the defendant's duty to secure it if possible, then I conceive that he could not have taken advantage of his own default. He would have been bound to take all reasonable steps to obtain the necessary licence to enable him to perform his contract obligations. See *In re Anglo-Russian Merchant Traders and John Batt & Co. (London)*. (3) In the present case, however, the contract has been wholly executed, a violation of the Defence of the Realm Order has in fact been committed; and the plaintiffs seek to recover for work done in disregard of an express prohibition. The dictum of Lord Denman in *Levy* v. *Yates* (4) does not, in my view, therefore, assist the plaintiffs.

In the second place, Mr. Hugo Young submitted that it was not shown that his clients were aware of the fact that

(1) [1901] 1 K. B. 624.
(2) (1838) 8 Ad. & E. 129, 134.
(3) [1917] 2 K. B. 679.
(4) 8 Ad. & E. 134.

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BRIGHTMAN & Co. v. TATE.

McCardie J.

no licence had been obtained beyond the licence of September 9, 1916. Now if the plaintiffs had bona fide believed that licences had been granted by the Ministry of Munitions to the full extent of 2671*l.*, I should have entertained a grave doubt as to the validity of the defendants' plea of illegality. Still graver would have been the doubt if such a belief had been induced by the words or conduct of the defendants. Several of the relevant decisions are worthy of mention. Where the illegality depends, for example, on the particular purpose to which a defendant may put goods supplied by a plaintiff the plaintiff may recover unless he was aware of the illegal purpose in the mind of the defendant. See *Pearce* v. *Brooks*. (1) If, moreover, a contract can be performed in either a legal or an illegal manner, then the plaintiff can recover unless he knew that the defendant intended the performance of the bargain in an illegal way. See *Waugh* v. *Morris*. (2) In *Langton* v. *Hughes* (3) the plaintiff, who was a druggist, failed because he knew that the defendant, a brewer, intended to use goods supplied in his brewery contrary to certain Acts of Parliament.

An opposite class of case to *Langton* v. *Hughes* (3) is illustrated by *Bloxsome* v. *Williams*. (4) There the plaintiff purchased a horse from a horse dealer on a Sunday. The dealer was apparently infringing the Sunday Observance Act, 1677 (29 Car. 2, c. 7), by carrying on his trade transactions on Sunday. The plaintiff, however, did not know that the defendant was a horse dealer at all, and therefore did not know that he was carrying on his usual vocation. Hence the Court held that the plaintiff could sue upon the contract. Bayley J. in giving judgment said: "In this case the fact that the defendant was a dealer in horses was not known to the plaintiff or his son, he therefore has not knowingly concurred in aiding the defendant to offend the law, and that being so, it is not competent to the defendant to set up his own breach of the law as an answer to this action." If the plaintiff in *Bloxsome* v. *Williams* (4) had been aware

(1) (1866) L. R. 1 Ex. 213.
(2) (1873) L. R. 8 Q. B. 202.
(3) 1 M. & S. 593.
(4) (1824) 3 B. & C. 232, 235.

that the defendant was carrying on his ordinary calling he could not have recovered in the action, for he would have been a particeps criminis, and would I conceive have been open to conviction as an aider and abetter in a criminal offence. See *Fairburn* v. *Evans*. (1) In that case he clearly could not have sued on the contract. Thus in *De Begnis* v. *Armistead* (2) the plaintiff failed to recover for moneys advanced to the defendant in connection with an unlicensed theatre, inasmuch as the defendant proved the plea that the plaintiff was aware that the theatre had no licence. It is clear that this fact was treated as a vital point by Tindal C.J. when giving judgment for the defendant.

In the present case the whole of the facts and circumstances compel me to the conclusion that the plaintiffs knew well that one licence only had been secured for the work at Little Bushey Farm. I am satisfied that they continued to proceed after the 1350*l.* had been expended in the hope that no question would be raised by the defendants as to the absence of an additional permission. They were, therefore, knowingly taking part in an illegal transaction, and they cannot, I think, recover the sums claimed in this action.

With regard to Mr. Hugo Young's subordinate, but ingenious, contentions, I need only say, First: That in my opinion the licence of September 9, 1916, was not a licence to spend 1350*l.* as from that date. It was a licence to spend up to 1350*l.* in all on Little Bushey Farm including the work done prior to the licence. Secondly: That the 1350*l.* must, in my opinion, be deemed to be inclusive and not exclusive of the plaintiffs' profit of 10 per cent. on materials and labour.

The result is that the defendants succeed on their plea of illegality, and they are in law entitled to keep the 1171*l.* worth of material and labour without payment. Judgment must, therefore, be entered for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *E. W. Reeves, for Sedgwick, Turner, Sworder & Wilson, Watford.*

Solicitors for defendants: *Bridges, Sawtell & Co.*

(1) [1916] 1 K. B. 218. (2) 10 Bing. 107, 109.

F. O. R.

C. A.
1919
Jan. 20.

[IN THE COURT OF APPEAL.]

SHEPHERD *v.* ROBINSON.

[1912 S. 337.]

LIVERPOOL DISTRICT REGISTRY.

Practice—Counsel's Authority—Compromise—Limitation of Authority unknown to the other Side—Mistake—Consent Order stayed before drawn up.

An action for debt being called on for hearing, counsel for the defendant consented to judgment against his client for part only of the claim, the plaintiff abandoning the balance. Without the knowledge of counsel on either side, or of the solicitors for the plaintiff, the defendant had given instructions to her solicitors that the case was not to be settled. Upon an application made before the judgment was drawn up:—

Held, that the case must be restored to the list for hearing.

Principle of *Holt* v. *Jesse* (1876) 3 Ch. D. 177 applied, *Strauss* v. *Francis* (1866) L. R. 1 Q. B. 379 distinguished.

APPEAL from an order of Darling J. in chambers.

The plaintiff sued the defendant for 6728*l.* 5*s.* on six promissory notes made by the defendant and her late husband. The case came on for hearing before Darling J. on December 6, 1918. The defendant had been represented by Messrs. Fowler, Legg & Co., a firm of solicitors, but immediately before the hearing, when it was too late to give any effective notice of change of solicitors, she had placed her interests in the hands of Messrs. Appleton & Co., with the result Messrs. Fowler, Legg & Co. remained on the record as her solicitors for the purposes of the action, while Mr. William Cooper Hobbs, a clerk of Messrs. Appleton & Co., also informally represented her at the trial.

When the case was called on proposals were made for a settlement, the plaintiff intimating that he was ready to accept 1950*l.*, the amount due on one of the promissory notes, with interest thereon and costs in settlement of the action. Mr. Theobald Mathew, counsel for the defendant, believing that he had full authority to consent to what he regarded as a favourable settlement, agreed to the following terms which were indorsed on the briefs: "December 6, 1918. The rest

of the claim being abandoned by the plaintiff, judgment for the plaintiff by consent for 2612*l.* 9*s.* 4*d.* and costs. Judgment to be in the proper form against a lady who contracted while covert and is now a widow with the usual proviso as to restrained property. Execution stayed for 3 months from to-day. Liberty to apply."

Before this judgment had been drawn up and entered the defendant applied to Darling J. to have the action restored to the list for hearing on the ground that her solicitors and counsel had no authority to settle the case. The following facts appeared from the affidavits filed on the hearing of the application.

On December 5 Messrs. Fowler, Legg & Co. telegraphed to the defendant saying that the case would be in the list for hearing on the following day, and requesting her to be at hand in case they might want to consult her about any terms of settlement. On December 6 the defendant attended at the office of Messrs. Appleton & Co., and sent Mr. Hobbs to tell Mr. Legg where she could be found if wanted and where she could receive any message delivered by Mr. Hobbs. When the case was about to be heard Mr. Legg, after a discussion with counsel for the defendant, said to Mr. Hobbs that counsel had advised a settlement, and that the plaintiff was prepared to accept the sum of 1950*l.* Mr. Hobbs deposed as follows: "I informed him" (Mr. Legg) "that I had no instructions to settle the matter, and that instructions had been given to me to contest the claim. I thereupon informed the said Legg that I would at once see the defendant and come back to the court with her instructions." Mr. Hobbs then went and saw the defendant, and told her that he had been to court and had seen Mr. Legg, who desired to know if she wished to settle on the terms suggested. She deposed as follows: "I instructed him to inform Mr. Legg that I was surprised that such a suggestion should be made, and that the action was to be fought out."

In the meantime counsel for the defendant had consented to judgment as stated above.

The application to restore the case to the list was heard on December 20. Mr. Legg and Mr. Hobbs were examined orally.

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Mr. Legg stated that he was quite unaware of any limitation upon his authority as solicitor for the defendant. In other respects the evidence given added nothing to the facts already set forth. During the hearing of the application Mr. Mathew entered the court. On being asked if he wished to make any statement he said, "The case was clearly one in which it was desirable that, before I agreed to any settlement, I should be satisfied that the solicitor instructing me had authority to authorize the settlement. I did satisfy myself, so far as I was able, that he had authority before I made the settlement."

Darling J. expressed the opinion that counsel had only done what he was bound to do, but that there might have been some misapprehension as to the solicitors' authority to make the settlement. He therefore restored the case to the list for hearing upon terms.

The plaintiff appealed.

Arthur Powell K.C. and *Merlin* for the appellant. The compromise is binding. Counsel is clothed with apparent authority to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause. If within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding. Express limitations upon counsel's apparent authority do not affect the validity of a compromise unless communicated to the other side: *Strauss* v. *Francis* (1); *Matthews* v. *Munster* (2); *Welsh* v. *Roe*. (3)

[BANKES L.J. There is an exception to that principle where counsel acts on a mistake: *Matthews* v. *Munster*. (2)

WARRINGTON L.J. In such a case a consent order may be revoked before it is passed and entered: *Holt* v. *Jesse* (4); *Harvey* v. *Croydon Union Rural Sanitary Authority* (5); *Hickman* v. *Berens*. (6)

DUKE L.J. referred to *Neale* v. *Gordon-Lennox*. (7)]

(1) L. R. 1 Q. B. 379.
(2) (1887) 20 Q. B. D. 141.
(3) (1918) 87 L. J. (K. B.) 520.
(4) 3 Ch. D. 177.
(5) (1884) 26 Ch. D. 249.
(6) [1895] 2 Ch. 638.
(7) [1902] A. C. 465.

The mistake must be as to some matter of fact in dispute between the parties: *Furnival* v. *Bogle*. (1)

Sir E. Marshall Hall K.C. and *M. O'Sullivan* for the respondent were not called on.

BANKES L.J. This is an appeal from an order of Darling J. restoring the action to the list for trial on certain terms. Mr. Powell contends that the action was settled by counsel acting within the scope of his apparent authority and, as a result, that the action ought to be treated as finally determined and ought not to be restored to the list. There are two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients. The first is that represented by *Strauss* v. *Francis* (2); *Matthews* v. *Munster* (3), and *Welsh* v. *Roe*. (4) In all those cases the question was whether the act of counsel had been within the scope of his authority. It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court. If Mr. Powell could bring this case within that line of decisions I should agree that this compromise must stand.

But there is a second and different line of cases which decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the Court will not proceed further with the drawing up and perfecting of the order, and will not lend its authority to compel observance of an agreement arrived at through a mistake. This is the line represented by *Holt* v. *Jesse* (5) and by *Neale* v. *Gordon-Lennox* (6), where Lord Halsbury L.C. said: "The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the

(1) (1827) 4 Russ. 142.
(2) L. R. 1 Q. B. 379.
(3) (1887) 20 Q. B D. 141.
(4) (1918) 87 L. J. (K. B.) 520.
(5) 3 Ch. D. 177.
(6) [1902] A. C. 465, 469.

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cause should not go on; and to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard." The distinction between these two lines of authority is well pointed out in *Little* v. *Spreadbury* (1) by Bray J., who, after dealing with the facts in *Neale* v. *Gordon-Lennox* (2), goes on to distinguish that case from the case before him. He said: "In the present case we have only to consider the question which ordinarily arises upon any contract that is signed by an agent, namely, whether that agent had authority to bind the principal."

The real question in the present appeal is within which class this case falls. Mr. Powell says it is a case where counsel acting in the scope of his apparent authority, without notice to the other side of any limitation of that authority, gave his consent to a judgment, which must therefore be treated as binding on his client. The other side contend that on the facts the Court could not properly compel the defendant to obey this consent judgment entered into as it was under a misapprehension on the part of her counsel. There seems to be a considerable difference of opinion as to the effect of counsel's apparent authority to settle a case where his client has given instructions not to settle. In *Little* v. *Spreadbury* (3) Lord Coleridge J. said: "My view of the law is this: Where a client has given specific instructions for a compromise, or has given a prohibition against compromising, except upon certain terms, the solicitor "—and the same would apply to counsel—" has no authority from the client to depart from those instructions without the client's consent express or implied." Bray J. said (4): "On behalf of the plaintiff it has been contended that in law it matters not whether there was such express prohibition or not if the other side was unaware of the prohibition. It seems to me to be unnecessary to decide that point." There are authorities on both sides. It is not necessary to decide that question in this case. The only question here is whether,

(1) [1910] 2 K. B. 658, 663.
(2) [1902] A. C. 465, 469.
(3) [1910] 2 K. B. 665.
(4) Ibid. 664.

the order never having been drawn up, the facts bring the case within the class of authorities of which *Holt* v. *Jesse* (1) is an example. In my opinion they do. Counsel acted under a misapprehension. It is immaterial whether the mistake was as to some particular matter forming part of the basis of the settlement or whether it was as to his authority to make a settlement. No order has been drawn up. The Court has been asked to give effect to a compromise consented to under a misapprehension and not yet effective. The order of Darling J. was right, and this appeal fails.

WARRINGTON L.J. I am of the same opinion. Nothing I am about to say is intended to impair the authority of counsel to settle an action on behalf of his client according to the principle of *Strauss* v. *Francis*. (2) The facts of this case exclude it from that principle, and bring it into a different line of authorities of which *Holt* v. *Jesse* (1) and *Neale* v. *Gordon-Lennox* (3) are examples. On the evidence two things appear plainly: first, that Mr. Hobbs, who acted on behalf of the defendant, though not officially representing her, had not and knew he had not authority to settle the action except on her express instructions. He says: "I told him" (i.e., Mr. Legg) "that I had no instructions to settle the matter, and that instructions had been given to me to contest the claim. I thereupon informed the said Legg that I would at once see the defendant and come back to the court with her instructions." He then left the court. That is not denied by Mr. Legg, who must have recognized that before the offer of a settlement could be accepted by Mr. Hobbs instructions must be obtained. He allowed steps to be taken to get instructions. The second thing that appears clearly is that in counsel's view the case was not one to be settled without the client's authority; but he thought her authority had been obtained. In so thinking he was mistaken. Before the judgment was drawn up steps were taken to prevent further proceedings in that direction. A motion was then made to restore the cause to the list for hearing, and an order

(1) 3 Ch. D. 177. (2) L. R. 1 Q. B. 379.
(3) [1902] A. C. 465, 469.

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Warrington L.J.

has been made restoring the case on terms. Those facts bring the case within *Holt* v. *Jesse* (1) and *Neale* v. *Gordon-Lennox*. (2) In the latter case the question arose as to the power of the Court in such circumstances to see that justice is done. Lord Halsbury L.C. said (3): "To suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard." Lord Lindley said (4): "Before that order is drawn up one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. Now, I venture to say that if that had happened in the Chancery Division, with the practice of which I am familiar, it would have been a matter of course for the learned judge who made that order to stay the drawing of it up if he had been informed that the Court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent. I cannot imagine that it would cross his mind for a moment that anything ought to be done except to stay the drawing up of that order. Unfortunately the plaintiff here wishing to get rid of the order drew it up with the view of getting it set aside, and in form this is an application, not to prevent the drawing up of the order, but to have it set aside; but that is mere form—mere machinery. It would be absolutely wrong, to my mind, for the Court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the Court never would have dreamt of making if the Court had known the facts." In the present case if the Court had known the facts, that the authority of counsel was limited and that counsel thought it was unlimited, the consent order would never have been made; and so the Court, having been asked, before that order has taken its final form, to restore the case to the list, is bound to grant the application. This appeal must therefore be dismissed.

(1) 3 Ch. D. 177.
(2) [1902] A. C. 465.
(3) Ibid. 470.
(4) Ibid. 473.

DUKE L.J. I agree. It is clear that counsel would never have consented to the compromise if he had known that his client had given instructions that there should be no settlement without her consent. Fortunately, the consent judgment was not drawn up and entered before that mistake was discovered. Then it follows beyond all doubt or question that the Court stays the drawing up of the order. Otherwise the Court would allow itself to be made an instrument of injustice in giving form and effect to a compromise which the parties concerned have never agreed to.

Appeal dismissed.

Solicitors for appellant: *Enever & Aarons.*
Solicitors for respondent: *Appleton & Co.*

W. H. G.

PARKER *v.* CRISP & CO.

1918
Nov. 22.

Sale of Goods—Oral Contract—Part Payment—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-s.* 1.

For a part payment by a buyer to satisfy s. 4, sub-s. 1, of the Sale of Goods Act, 1893, there must be an acceptance of it by the seller of such a nature as affords some evidence of the contract which is in question, but the acceptance need not be unqualified.

On April 22, 1918, the plaintiff verbally agreed to buy from the defendants for 387*l.* 10*s.* a quantity of saccharine, and on the same day he sent his cheque in accordance with the agreed mode of payment. On the following day—the duty on saccharine having in the meantime been increased—the defendants wrote to the plaintiff: "As you are aware the duty on saccharine since yesterday has been increased practically double, and unless you are able to pay the excess duty we regret we shall be unable to send you the goods. We will return your cheque with pleasure upon hearing from you that you will not require the goods." The plaintiff refused to pay the increased duty, there being no stipulation in the contract to that effect, and after some correspondence the defendants returned the plaintiff's cheque a few days later:—

Held, that there had been a part payment to satisfy s. 4, sub-s. 1, of the Sale of Goods Act, 1893.

Davis v. *Phillips, Mills & Co.* (1907) 24 Times L. R. 4 distinguished.

APPEAL from Liverpool County Court.

The plaintiff claimed damages for breach of a verbal contract

1918

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to deliver at Liverpool a quantity of saccharine which the defendants had in London.

On April 22, 1918, the parties were in telephonic communication regarding the purchase of the saccharine by the plaintiff, and later on the same day the plaintiff wrote to the defendants, ". . . . I beg to confirm having bought from you one canister 25 lb. saccharine . . . . at 310*s.* per lb., and beg to enclose cheque in payment of same value 387*l.* 10*s.*, which kindly acknowledge receipt of . . . ." On the following day—the duty on saccharine having in the meantime been increased by 60*s.* per lb. in the Budget proposals submitted to the House of Commons during the afternoon of April 22—the defendants replied as follows: "In reply to yours of yesterday's date, as you are aware the duty on saccharine since yesterday has been increased practically double, and unless you are able to pay the excess duty we regret we shall be unable to send you the goods. We will return your cheque with pleasure upon hearing from you that you will not require the goods." The plaintiff refused to pay the increased duty, maintaining that it was no term of the contract that he should, and after further correspondence the defendants returned the plaintiff's cheque some days later.

The defendants gave notice of the special defence that s. 4 of the Sale of Goods Act, 1893, had not been complied with.

The county court judge found as a fact that the defendants agreed to sell the saccharine at 310*s.* per lb. and to deliver it in Liverpool; that the defendants made no stipulation as to the price being increased if the duty was increased; that it was agreed that the plaintiff should send his cheque, and that in sending it the plaintiff was carrying out the agreed mode of payment. He accordingly gave judgment for the plaintiff.

The defendants appealed.

Gandy for the defendants. First, the cheque not having been accepted there was no part payment to satisfy s. 4 of the Sale of Goods Act. An unqualified acceptance of payment

is necessary to satisfy the section. The decision of Channell J. in *Davis* v. *Phillips, Mills & Co.* (1), where he held that the sending of a cheque, which was returned, did not constitute part payment within the section, is directly in point. If actual cash had been tendered and had been refused there would clearly have been no payment to satisfy the section; similarly the tender of the cheque was not payment or part payment. Secondly, the defendants' letter did not constitute a memorandum to satisfy the section, as there was no unequivocal admission of the contract therein; but, in any view, that and the previous letters were not a sufficient memorandum, as they did not contain all the material terms; thus, they did not show that the delivery was to be in Liverpool.

du Parcq (*Barrington-Ward* with him) for the plaintiff. There was a payment to satisfy s. 4. *Davis* v. *Phillips, Mills & Co.* (1) is distinguishable. There the cheque was returned at once with a repudiation of there having been any concluded contract, whereas in this case the cheque was kept for several days while the defendants sought to impose an additional term upon the plaintiff—namely, the payment of the additional duty.

Gandy in reply. It is sought to distinguish *Davis* v. *Phillips, Mills & Co.* (1) on the facts, but the principle was there laid down that there can be no payment to satisfy the section without acceptance. In this case there was no acceptance of the cheque inasmuch as a condition was attached. The mere fact that the cheque was retained for a few days does not in these circumstances affect the question.

LORD COLERIDGE J. stated the facts and findings of the county court judge and continued as follows: The first question is whether there was a payment by the plaintiff to satisfy s. 4 of the Sale of Goods Act, 1893. On that our attention has been directed to the decision of Channell J. in *Davis* v. *Phillips, Mills & Co.* (1) In that case the plaintiff said that he verbally agreed with the defendants to buy from them certain goods above the value of 10*l.*, and to send them

(1) 24 Times L. R. 4.

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Lord Coleridge J.

a cheque for 10*l.* in part payment. The plaintiff sent a cheque for 10*l.* by post, and, later on, in answer to a telephonic message from the defendants, he sent a second cheque for the balance by post. The two cheques were received by the same post, and the defendants at once returned them, alleging that there was no concluded contract. The plaintiff having brought his action to recover damages for non-delivery of the goods, Channell J. said that, assuming there was a concluded contract between the parties, about which he had considerable doubt, the question was whether, being verbal, it was taken out of the Sale of Goods Act by the fact of the plaintiff sending the cheques which, when they reached the defendants' hands, were immediately returned. He held that there was not a payment which took the case out of the statute, and he went on to say that a payment, to satisfy the statute, meant a payment made to and accepted by the vendor; the mere sending of money which was returned would not do. He further said that the post office was not the defendants' agent to accept the part payment on their behalf to take the case out of the statute. There, it will be observed, the defendants instantly returned the cheques, and in returning them repudiated the suggested contract. In those circumstances it could hardly be said that the mere posting of the cheques and the delivery of them by the post office to the defendants, the cheques being immediately returned, could be treated as an acknowledgment of the suggested contract. In the present case the facts are wholly dissimilar. It is clear from the defendants' letter of April 23, read in the light of the judge's findings of fact, that the defendants were conscious that there was no contract in existence which justified them in calling upon the plaintiff to pay more than the amount of the cheque. The reasonable construction of the letter amounts to an acceptance of the cheque as part payment accompanied by a threat to return it if the defendants' further demand in regard to the price is not agreed to. So read it is consistent only with a recognition on the part of the defendants of the contract that had been made. There was therefore a part payment to satisfy the statute. If this be so, it is unnecessary to enter

into the further question whether the letter was or was not a sufficient memorandum in writing to satisfy the section. In my opinion the letter did not constitute a sufficient memorandum inasmuch as it did not contain or refer to all the necessary terms, but, as I have said, this point becomes immaterial in view of the conclusion I have arrived at on the other point. The appeal must be dismissed.

AVORY J. I agree that the letter of April 23 is ambiguous and cannot be relied upon as a memorandum in writing of the contract signed by the party to be charged. Upon the other point it is material to observe that the cheque which was sent by the plaintiff in accordance with the terms of the contract was in fact retained by the defendants for four or five days, and the question is whether in those circumstances something was given in earnest to bind the contract or in part payment. I do not think that it can be regarded as something given in earnest. Then was it part payment? It has been rightly admitted that a mere tender of payment is not sufficient; but it has been contended by Mr. Gandy that there can be no payment within the section without an unqualified acceptance by the person to whom the cheque is sent. I doubt whether that is right. A man might receive a cheque and might write to the sender, "I have received your cheque, but I have changed my mind, and I am not going to fulfil my contract." That would not be an unqualified acceptance of the cheque, but it cannot be disputed that there would have been a part payment to satisfy the section. No doubt there must be an acceptance of such a nature as affords some evidence of the contract which is in question. The letter of April 23, read in the light of the findings of fact, amounted to this: "We regret that having regard to the increase in duty we cannot carry out our contract." If it means that, it is obvious that there was a receipt by the defendants of the cheque which affords evidence of the contract, because if a man says, "I regret I cannot carry out the contract," it is evidence that there was a contract. I agree that the appeal must be dismissed.

Appeal dismissed.

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PARKER v. CRISP & CO.

Solicitors for plaintiff: *Dennison, Horne & Co., for Adcock & Simmons, Birmingham.*

Solicitors for defendants: *Davenport, Cunliffe & Blake, for Edward Lloyd, Liverpool.*

J. S. H.

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Jan. 17, 20, 21, 22; *Feb.* 6.

THORNETT & FEHR *v.* BEERS & SON.

[1918 T. 820.]

Sale of Goods—Implied Condition—Merchantable Quality—"If buyer has examined the goods"—Sale of Goods Act, 1893 (56 & 57 *Vict.* c. 71), *s.* 14.

Sect. 14, sub-s. 2, of the Sale of Goods Act, 1893, provides that "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

The defendants, who were desirous of purchasing a quantity of vegetable glue from the plaintiffs, who dealt in that commodity, went, by arrangement with the plaintiffs, to the warehouse where the glue, which was in barrels, was stored, for the purpose of inspecting it. Every facility was offered the defendants for inspection; but, being pressed for time, they did not have any of the barrels opened, and merely looked at the outside of the barrels. The defendants purchased the glue, and after it was delivered, they alleged that it was not of merchantable quality:—

Held, that the defendants had "examined the goods" within the proviso to s. 14, sub-s. 2, and, consequently, there was no implied condition that the glue was of merchantable quality.

ACTION tried by Bray J. as a commercial cause.

The plaintiffs, who dealt in vegetable glues, sued the defendants to recover 363*l.* 1*s.* 8*d.*, the balance of the price of certain barrels of vegetable glue. By their defence the defendants set up that the sale was a sale by sample, that it was by mutual mistake that this term was omitted in the sold note, that the glue was not equal to sample, and alternatively that it was not merchantable, and they counterclaimed the return of 3000*l.* which they had paid, and damages, alleging that the glue was of no value.

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After certain negotiations between the parties with regard to the glue, it was proposed that they should meet at Nottingham where the glue, in barrels, was lying in a warehouse, so that the defendants could see it. Accordingly, on September 18, 1918, the defendants wrote to the plaintiffs: "We are arranging for our representative who is at present in Birmingham to visit Nottingham to-morrow morning in order to inspect the thirty-five tons adhesive in question." The plaintiffs agreed to this, and stated that they had requested their representative to meet the defendants at the warehouse at Nottingham. On September 19, the plaintiffs' representative, Mr. Arnholt, went to the warehouse at 10 a.m. and waited till noon, but the defentants' representative did not come. Mr. Arnholt having other business to transact then left, but mentioned that he would return when informed that the defendants' representative had arrived. Before leaving he told the foreman at the warehouse to give the defendants' representative every facility for inspection. Between 12 and 1.30 the defendants' representatives, Mr. Halfhide and Mr. Beers, called at the warehouse, but when Mr. Arnholt returned at 1.30 they had left. Mr. Halfhide stated in evidence, and the judge accepted this, that he did not have any of the barrels opened, and only looked at the outside, but he admitted that he and Mr. Beers had been offered every facility and had received Mr. Arnholt's message that he would return, but he said that they had no time to wait as they had another appointment. On the following day the defendants, in conversation with the plaintiffs' representative, said that they had inspected the parcel, and they offered 90*l.* a ton for it. That offer was not accepted, and eventually the defendants agreed to buy at 95*l.*, and a sold note was made out on that basis.

MacKinnon K.C. and *Claughton Scott* for the plaintiffs. The defendants having inspected the goods in such a way as they deemed sufficient cannot say that there was an implied condition that the glue was merchantable.

Sir John Simon K.C. and *P. Hastings* for the defendants. Sect. 14 of the Sale of Goods Act, 1893, has altered the law,

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for, whereas before the Act there was no implied condition that the goods were merchantable if the buyer had an opportunity of examining the goods, the Act now says that there shall be no implied condition "if the buyer has examined the goods." In this case there was no examination of the goods to satisfy the words of the section. There was therefore an implied condition that the glue was merchantable.

MacKinnon K.C. replied.

[*Jones* v. *Just* (1) and *Wallis* v. *Russell* (2) were referred to.]

Cur. adv. vult.

Feb. 6. BRAY J. read his judgment in which, after holding on the facts that the sale was not by sample, he continued as follows :—The next question is whether under s. 14, sub-s. 2, of the Sale of Goods Act, 1893, there was an implied condition that the goods should be merchantable. This raises a somewhat difficult question. The sub-section is as follows : "Where goods are bought by description from a seller who deals in goods of that description . . . . there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." First, were the goods bought by description ? In *Varley* v. *Whipp* (3) the head-note, which I think accurately states the actual decision, reads thus : "The expression 'contract for the sale of goods by description,' in the Sale of Goods Act, 1893, s. 13, applies to all cases where the buyer has not seen the goods, but relies solely on the description given by the seller." I do not think it can be said here that the buyers relied solely on the description. They had seen the goods, and certainly relied partly on what they had seen. I infer this from what they stated on September 20 when Mr. Halfhide began by saying, "I have inspected the goods." I do not think, however, that it is necessary for the decision to lay down so broad a proposition that there could not be a sale by description where the buyer

(1) (1868) L. R. 3 Q. B 197. (2) [1902] 2 I. R. 585.
(3) [1900] 1 Q. B. 513.

had seen the goods, and relied only partly on the description. I desire to leave that question open and not to decide that there was no implied condition that the goods were merchantable on the ground that it was not a sale by description.

Proceeding with the section, it is not disputed that the plaintiffs were sellers who dealt in vegetable glue. I now come to the proviso. Before the passing of the Act I think the law stood as laid down in *Jones* v. *Just* (1), where it is said that "where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim caveat emptor applies." The sub-section, however, does not use the words "where the goods may be inspected by the buyer," but "if the buyer has examined the goods." In other words, it is not sufficient that the buyer should have had the opportunity of inspecting the goods, he must have examined them. I think the change of language must have been intentional, and I must see whether the buyers examined the goods. I do not think the statute requires a full examination, because the words that follow show that the proviso deals with the case where the buyer has not made a full examination. Was there an examination? I find that on September 18 both parties intended a full examination. The facts that both parties were to be present, that the foreman was told by the plaintiffs to offer the defendants every facility, and the defendants' letter of September 18 go to show this. I think I must take it that the defendants did not in fact have any barrels opened, but I think that the reason was that they had no time; they were satisfied with their inspection of the barrels, and they were willing to take the risk, the price being so low, and Mr. Halfhide himself, as I have found, told the plaintiffs at the beginning of the interview when the bargain was made that he had inspected the parcel. It may be a question whether, after this statement, the defendants could be heard to say that they had not examined the glue, but however that may be, I think they examined the goods within the meaning of the sub-section. There can be no doubt that such an examination if made in the ordinary way would have

(1) L. R. 3 Q. B. 197, 202.

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Bray J.

revealed the defects complained of. The defects complained of were apparent the moment the casks were opened. The examination agreed to on September 18, which they had full opportunity of making on September 19, would involve the opening of a sufficient number of casks to ascertain the condition of the glue. I hold that this case falls within the proviso, and consequently there was no implied condition. Having found that it was not a sale by sample, and that there was no implied condition that the glue was merchantable, the defence fails, and the plaintiffs are entitled to judgment.

[His Lordship then considered the question whether in point of fact the glue was merchantable so as to avoid the necessity of a new trial in the event of its being held by the Court of Appeal that there was an implied condition. On the facts he came to the conclusion that it was not merchantable, and he assessed the difference between its value as delivered and the value it would have had, if merchantable, at 150*l.*]

Judgment for plaintiffs.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Theodore Goddard & Co.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A. 1919 Jan. 13, 14.

In re BOKS & CO. AND PETERS, RUSHTON & CO., LIMITED.

Arbitration—Practice—Award—Doubt as to Validity—Application to enforce in summary Manner—Refusal of Application—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.

Where there is no objection to an award or where the objection raised is one which can easily be disposed of, the summary procedure provided by s. 12 of the Arbitration Act, 1889, is prompt and convenient; but that where there are matters which may gravely affect the validity of the award or the right to proceed under it, it is proper that they should be dealt with by an action in which the facts can be fully ascertained, and no order under the section should be made giving leave to proceed summarily under the award.

Decision of Lush J. affirmed.

APPEAL from an order of Lush J. in chambers setting aside an order of Master Jelf for the enforcement in a summary manner of an award in an arbitration between C. A. E. Boks (trading as Boks & Co.) and Peters, Rushton & Co., Ltd.

The following statement of the facts is taken substantially from the judgment of Swinfen Eady M.R. :—

The claim arose out of a contract that was entered into on January 17, 1918, whereby Boks & Co., hereinafter called the sellers, sold to Peters, Rushton & Co., Ltd., hereinafter called the buyers, about 90 tons of Congo palm nut kernels. The contract was a c.i.f. contract to La Pallice or other French port, the war risk being included in the price. Payment was to be made "95 per cent. cash against documents in London," and the balance 14 days after weighing. The contract contained a provision that "Any dispute on this contract to be settled by arbitration in Liverpool, as provided for by the conditions of sale, except that non-members of this Association"—that was the Liverpool General Brokers' Association, Ltd.—"engaged in the palm kernel trade in Liverpool, shall be eligible for nomination as arbitrators on questions of quality only."

That contract having been entered into on January 17, 1918,

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it appeared from the correspondence that the goods in question were loaded on board a ship which came into collision and put into the port of Dacca, and there was some question as to whether this portion of the cargo had sustained serious damage or not. At one time, it was stated, there was a claim as for a total loss, and the buyers took the objection that they were not, under the circumstances, liable to pay against documents. Then they were pressed to pay, and declined to pay. Thereupon a request was made by the sellers for a reference to arbitration, an arbitration was held, and an award was made.

The sellers alone appeared before the arbitrators, and the award, which was made on April 20, 1918, was as follows :— "(*a*) The sellers on March 9, 1914, duly tendered the documents, as required by clause 9 of the contract. (*b*) The buyers have accordingly come under an obligation to pay, and shall therefore pay forthwith to the sellers the sum of 2795*l*., plus interest at 5 per cent. per annum from March 9, 1918, to the date of payment." It was stated that the cases in which the goods were packed were only slightly damaged. At all events, the goods were sold for the benefit of those whom it might concern, and the sum awarded was the difference between the contract price and the sum the goods fetched. However arrived at, that was the sum the arbitrators awarded as payable by the buyers. Then the award proceeded :—"(*c*) The said payment under clause (*b*) hereof to be without prejudice to the rights of either party which may thereafter arise under any clauses of the said contract in regard to any balance or any adjustments or cancellation or otherwise."

Having obtained that award, the sellers pressed for payment, but payment was not made ; and accordingly an order under s. 12 of the Arbitration Act, 1899 (1), was obtained from Master Jelf on May 13, 1918, giving leave to enforce the award in a summary manner. The buyers

(1) Arbitration Act, 1889, s. 12 : "An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect."

thereupon proceeded to make arrangements to comply with the award, and an appointment was made to attend at the office of the sellers' solicitors to make the payment on production of the licence authorizing the transaction in question.

By clause 1 of an Order dated May 1, 1917, made by the Minister of Munitions in exercise of the powers conferred upon him by the Defence of the Realm Regulations "As from the date hereof until further notice no person shall purchase, sell, or, except for the purpose of carrying out a contract in writing existing prior to such date for the sale or purchase of any of the articles specified in the First Schedule hereto, deal in any of the said articles, whether situated within or without the United Kingdom, except under and in accordance with the terms of a licence issued by or under the authority of the Minister of Munitions. . . . ." In the First Schedule to that Order palm kernels were included, so that it was unlawful to deal in palm kernels except under the authority of a licence; and on the appointment to make the payment pursuant to the award a request was made for the production of the licence. The licence was not produced, and there was an adjournment, and the licence was to be produced on the day fixed. Ultimately, on May 17, the buyers attended at the office of the Ministry of Food (Oils and Fats Section), and were informed that no licence had in fact been issued authorizing the transaction in question. Thereupon an application was at once made to Lush J., who granted a stay of execution under Master Jelf's order until the matter could be disposed of, with liberty to apply to discharge the stay.

Ultimately a suggestion was made that, under the circumstances, the proper course was to move to set aside the award, and subsequently there was a motion before the Divisional Court to set aside the award. The view taken by that Court was that it would not be right to set aside the award, the matter being treated as if it were a matter arising out of an illegal transaction where the Court would not interfere in any way, either to enforce the award or to set it aside, but would let the parties remain in whatever position they were. The Court, on this ground, declined to set aside the award. That

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being so, and the time being extended, there was an appeal from Master Jelf's order to Lush J. asking him to discharge that order giving leave for the summary enforcement of the award, and he did discharge it.

The sellers appealed.

R. A. Wright K.C. and *Claughton Scott* for the appellants. The respondents are now too late to raise the point as to the illegality of the contract. The defence of illegality is a matter extrinsic to the contract. The illegality does not appear on the face of the contract itself. The proper time for the respondents to take the point was at the hearing before the arbitrators, or at the latest before the Master. It could not be taken for the first time before the judge on appeal from the Master. If there was any illegality at all it was in entering into the contract. The appellants then produced the licence they had, which was a Merchant's General Licence, which showed what they were licensed to do. It was the duty of the respondents under the Order of the Minister of Munitions to see that the appellants had a proper licence to enter into the present transaction. There was no question of surprise. "Where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented." Per Viscount Haldane L.C. in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1) See also *Middleton* v. *Hill* (2) and *Owens* v. *Denton.* (3)

[SWINFEN EADY M.R. referred to *Wohlenberg* v. *Lageman.* (4)]

The Court is not now in a position to deal with the facts of the case, but must accept them as found by the arbitrators.

[SCRUTTON L.J. referred to *Steers* v. *Lashley.* (5)]

The order of the Master put the appellants in the same

(1) [1914] A. C. 461, 469.
(2) (1597) Cro. Eliz. 588.
(3) (1835) 1 C. M. & R. 711.
(4) (1815) 6 Taunt. 251.
(5) (1794) 6 T. R. 61.

position as if they had obtained a judgment against the respondents. Such a judgment will not be set aside unless there has been fraud or some subsequent evidence has been obtained which could not with reasonable diligence have been discovered before. The appellants are entitled to hold the order of the Master which ought never to have been set aside. The Court will not go behind the award.

Leck K.C. and *H. L. Tebbs* for the respondents. It is now conceded that the contract was illegal, and that it could not have been enforced if the illegality had been raised in time. The illegality was discovered by the respondents only after the Master's order had been made when they were endeavouring to comply with the award. The Court has now had the illegality brought to its notice, and it is its duty to see that the powers of the Court are not used to enforce an illegal contract: *Gedge* v. *Royal Exchange Assurance Corporation*. (1)

Wohlenberg v. *Lageman* (2) is distinguishable. The Court there refused the motion on the ground that the questions were of mixed law and fact which had been referred to arbitration and decided by the arbitrators and that the Court would not interfere with their decision. Here by the award the only question the arbitrators decided was whether there had been a tender as provided for by clause 9 of the contract. The question whether the contract was illegal was not submitted to, and was not dealt with by them. The only point now before the Court is whether if the Master had had all the facts before him he would have made the order he did. It is submitted that the appellants ought to be left to bring their action to enforce their claim so that the question of illegality may be raised as a defence.

Claughton Scott in reply. The scheme of s. 12 of the Arbitration Act, 1889, is that when an award has been made on the face of which there is no apparent defect the successful party is in a position to get an order in a summary manner which is to have the effect of a judgment in an action. As to the nature of an application to enforce an award see per Rigby

(1) [1900] 2 Q. B. 214, 219. (2) 6 Taunt. 251.

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L.J. in *Ex parte Caucasian Trading Corporation.* (1) [He also referred to *Delver* v. *Barnes.* (2)]

SWINFEN EADY M.R. This is an appeal from an order of Lush J. reversing an order of Master Jelf, which order of Master Jelf had sanctioned the enforcement in a summary manner of an award arising out of a contract between Boks & Co., as sellers, and Peters, Rushton & Co., Ltd., as buyers. The appellants contend that the order of Lush J. was erroneous, and that, having obtained an award in the matter of this contract whereby a large sum is payable by the buyers to the sellers, they ought to be at liberty to enforce it in a summary way, as sanctioned by the order of the Master, and they ask that the order of the Master may be restored and that of Lush J. reversed.

[The Master of the Rolls stated the facts and continued :]

We are pressed to say that there is no ground for interfering with the Master's order, and that, as the sellers have obtained an award, they ought now to be allowed to proceed to enforce it ; and it is urged that as they have obtained an order giving them leave to proceed summarily the case is in the same position as it would be if they had obtained an actual judgment against the buyers for the amount in question. I am of opinion that we cannot deal with it on that footing.

The appeal to the judge in chambers was from the order of the Master, and the order giving leave to enforce the award in a summary manner was the subject of appeal and was discharged.

It is well settled that the procedure by action upon an award is one that ought to be pursued where the objections raised are such as to render the validity of the award a matter of doubt. Where there is no objection to the award, or where the objections raised are such as can be easily disposed of, the summary procedure is prompt and convenient ; but where there are matters which may gravely affect the validity of the award, then it is proper that they should be dealt with by an action in which the facts can be fully ascertained, and no

(1) [1896] 1 Q. B. 368, 371. (2) (1807) 1 Taunt. 48.

order should be made giving leave to proceed summarily under the award. The practice is stated in Russell on Arbitration, 9th ed., at p. 322, as follows: "Now that under s. 12 of the Arbitration Act, 1889, an award may be enforced as a judgment or order, although the right to bring an action is not thereby taken away, the necessity for an action no longer exists to the same extent as formerly; but an action is still the proper mode of procedure . . . . where the validity of the award or the right to proceed upon it is so doubtful that leave to enforce it under the above section cannot be obtained." In my opinion that is applicable to the present case, and the validity of the award is so doubtful that leave to enforce it in a summary manner ought not to be given.

It must be remembered that the sellers were insisting that they had a licence which extended to this particular transaction, and no question arose in the arbitration with regard to the licence. The fact that there was no licence extending to this transaction had not then been discovered by the buyers, and it was not until after the delay in producing the licence, which seems to have given rise to suspicion, that a direct inquiry at the Government office led to the fact being ascertained that there was no licence existing. Now this fact was not ascertained until after the publication of the award.

In these circumstances I am of opinion that the proper course was, and is, to leave the sellers to bring such action on the award as they may be advised; it is not a case in which relief ought to be given by way of enforcing it in a summary manner.

For these reasons I am of opinion that the order of Lush J. reversing the order of the Master was right and ought to be upheld.

SCRUTTON L.J. (after stating the facts). I accept the view stated by the Master of the Rolls, which entirely agrees with my own experience of the practice—namely, that this summary method of enforcing awards is only to be used in reasonably clear cases. It is not intended on the

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Scrutton L.J.

application for leave to enforce an award to try a complicated or disputed or difficult question of law. If it is not reasonably clear that the award should be enforced, the party seeking to enforce it must be left to his remedy by action, when the matter can be raised on proper pleadings and dealt with in proper form. Without expressing any opinion as to what may ultimately happen it seems to me that this is not a case where the right to proceed on the award is so clear that leave should be given to enforce it in a summary manner. I have no doubt that if this point about illegality had been taken before Master Jelf he would have made the same order as the judge. The same course was taken in a case before the other Court of Appeal recently.

For the reasons I have stated and without expressing any opinion as to the rights of the parties, I agree that the order of Lush J. was right and that his decision must be upheld.

Appeal dismissed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Nunn, Popham & Starkie.*

W. I. C.

[IN THE COURT OF APPEAL.]

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Jan. 24.

STOKER v. WORTHAM.

Employer and Workman—"Workman"—Employment of a "casual nature"—Temporary Cook—Engagement for short Period during Absence of permanent Cook—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

The applicant was engaged by the respondent as a temporary cook while her permanent cook went away for a holiday. The engagement was for the fixed period of a fortnight at 15*s.* a week with board and lodging. While performing her duties she sustained an injury by accident which totally incapacitated her for work. Upon a claim for compensation under the Act the respondent objected that the employment was of a "casual nature," and that the applicant was not therefore a "workman" within s. 13 of the Act.

The County Court judge awarded in favour of the respondent:—

Held, on appeal, that the question whether the employment was or was not "of a casual nature" was reasonably debatable, and therefore applying the rule laid down by Hamilton L.J. in *Knight* v. *Bucknill* (1913) 6 B. W. C. C. 160, it was for the county court judge to decide, and his decision could not be interfered with.

APPEAL from the award of the judge of the Marylebone County Court sitting as arbitrator under the Workmen's Compensation Act, 1906. The applicant was engaged by the respondent as a temporary cook while her permanent cook was absent on holiday. The engagement was for a fixed period of a fortnight at 15*s.* a week with board and lodging. While performing her duties during the fortnight she slipped on some wet oilcloth in the kitchen and, falling, dislocated her hip and fractured her thigh, and was in consequence totally incapacitated for work. She stated in evidence that she had her name on the books of a servants' registry for either a temporary or a permanent job, and that she had had several temporary jobs but no permanent one for some time. She claimed compensation from the respondent, who pleaded that the employment was of a casual nature and that the applicant was not therefore a "workman" within s. 13 of the Act. (1)

(1) The Workmen's Compensation Act, 1906, s. 13, provides: "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade

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The county court judge made his award in favour of the respondent. After delivering an oral judgment he made a short note of it in which he said that after referring to the cases which had been cited in argument before him he held that the engagement of the applicant was of a casual nature, being only, as Cozens-Hardy M.R. put it in *Hill* v. *Begg* (1), the calling in of a woman not part of the respondent's regular establishment to do a particular job as and when necessity arose. In the language of Hamilton L.J. in *Knight* v. *Bucknill* (2) the word "casual" meant something between regular employment and a simple engagement for a single day, and it was for the arbitrator to decide on the facts of any particular case whether the work was casual or permanent. He held that the applicant's work was casual.

The learned county court judge afterwards made a fuller note of his judgment in which he said that counsel for the applicant relied on *Dewhurst* v. *Mather* (3), the case of a charwoman, and contended that here the employment was not of that nature, the engagement being for a fixed definite period of a fortnight. Counsel for the respondent relied on *Hill* v. *Begg* (1) and *Knight* v. *Bucknill* (2), and contended that the employment of the applicant for a fortnight only was neither permanent nor periodical but temporary only, and was therefore of a casual nature, and, added the learned county court judge, "I am of opinion that this contention is right and that the employment of the applicant was of a casual nature." He then further considered the authorities and said: "Applying these judgments to the present case I think that tried by every test the employment of the applicant was of a casual nature. (1.) She was no part of the respondent's regular establishment but was called in to do the particular job of cooking for a limited time, when necessity arose through the absence of the regular cook. (2.) Her employment was neither

or business . . . . but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

(1) [1908] 2 K. B. 802.

(2) 6 B. W. C. C. 160.

(3) [1918] 2 K. B. 754.

permanent nor periodical, but was employment for a limited time only—namely, a fortnight—and though stable for that fortnight, was not likely to remain. (3.) It was something midway between the employment of a regular cook and a simple engagement for a single day, and I hold that it was on the casual side of the line dividing casual from regular employment." And he awarded accordingly.

The applicant appealed.

Cyril Atkinson K.C. and *Bernard Campion* for the appellant. Unless her employment is of a "casual nature" the appellant is certainly a "workman" within the Act. She is engaged under a contract of service for a definite period, and during that period there is stability of employment. The engagement could not be terminated by notice. The work which she was employed to do was part of the ordinary routine of the house and not a casual job. She was paid by the week and not by the hour or day. The county court judge has misdirected himself by holding that because the engagement was not permanent it was necessarily casual. There was more stability in the employment here than in the case of the charwoman in *Dewhurst* v. *Mather* (1), where it was held that the employment was not casual.

Hill v. *Begg* (2) does not govern the present case. The applicant was for a substantial period engaged as part of the permanent staff of servants of the house. The employment was temporary, but not casual.

Applying every test laid down in *Knight* v. *Bucknill* (3) the employment of the applicant was not of a casual nature. [He also referred to *Smith* v. *Buxton*. (4)]

Shakespeare for the respondent. In *Knight* v. *Bucknill* (3) Hamilton L.J. said that when the state of facts was such that it was reasonably debatable as to whether the employment was permanent or "casual" it must be for the county court judge to decide.

The question is whether this case comes within *Dewhurst* v. *Mather* (1) or *Hill* v. *Begg*. (2)

(1) [1908] 2 K. B. 754.
(2) Ibid. 802.
(3) 6 B. W. C. C. 160, 164.
(4) (1915) 8 B. W. C. C. 196.

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It is impossible to say that the county court judge could not properly have arrived at the conclusion to which he came.

Cyril Atkinson K.C. in reply. In considering this question the cause which has brought about the employment must be eliminated. Every employment arises from some casualty or chance, but in order for the employment to be casual there must be something fortuitous in the nature of the work.

SWINFEN EADY M.R. [after stating the facts]. Sect. 13 of the Act contains a definition of "workman," and it states what "workman" does and does not include. It is the injured workman who is entitled to compensation under the Act. [The Master of the Rolls read the section and continued.] The objection in the present case is that the applicant's employment was "of a casual nature," the facts being that she was employed for a fortnight in the place of a regular servant, who remained in the service of the employer, but was temporarily absent from her work on a short holiday. Is the employment of such a person under those circumstances "of a casual nature"? From time to time cases have arisen in which judges have substituted for the word "casual" some other adjective without perhaps throwing much light upon the meaning of the word "casual" as here used. In *Knight* v. *Bucknill* (1) Hamilton L.J. said: "In the context of s. 13 one might infer that the employment of a casual nature is something distinguished from a workman under the Act. It would appear to infer something midway between the regular employment of a workman and a simple engagement for a single day, and I think that casual is here used not as a term of precision, but as a colloquial term. I can think of no adjective to describe it better, nor will I venture to add an adjective to the already considerable list of those contrasted with it by various learned judges. There is a state of facts in which it would be impossible for a reasonable tribunal to say that work was casual, and equally there is a state of facts in which it would be impossible for a reasonable tribunal to say that it was permanent; but I am unable to formulate the test which would deter-

(1) 6 B. W. C. C. 160, 164

mine the boundary between these two conditions as a matter of law, and I think it may be inferred that when the state of facts is midway between these two states, so that the question is reasonably debatable, it must be for the county court judge to decide." Then in a subsequent case of *Smith* v. *Buxton* (1) the late Master of the Rolls referring to the judgment that I have just read says: "It has been held in this court by Hamilton L.J., that 'casual' is not a term of precision but a colloquial term, and where the case is one which is reasonably debatable it must be for the county court judge to decide." In the previous case of *Knight* v. *Bucknill* (2) in which the passage occurs that I have already read from the judgment of Hamilton L.J., the late Master of the Rolls expressed his opinion that it was inexpedient to attempt to define within limits the precise meaning of this word "casual"; and he said (3): "I am quite unable to give a general definition of casual as opposed to regular employment which would meet every case. I do not even think it desirable to define within precise limits employment which is casual and employment which is not." Where a statute is passed providing that a person whose employment is of a casual nature shall not be included in the term "workman" I do not think that it is for the Court to define exhaustively the persons there referred to so as to bind succeeding judges to say that only those persons who come within the definitions so laid down should be deemed to be within the Act, and that others shall be outside it. The true rule is, I think, that laid down by Hamilton L.J. There is a class of cases where it is quite clear the employment is regular, permanent, stable and not casual. There is another class of cases on the other side of the line where manifestly the employment is of a casual nature. Between those two it may become more and more difficult to say on which side of the line the individual case falls. In those cases it is a question of fact to be determined by considering not only the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period of time over which

(1) 8 B. W. C. C. 196, 200. (2) 6 B. W. C. C. 160.
(3) Ibid. 162.

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the employment extends, indeed all the facts and circumstances of the case.

In my opinion that is what the learned county court judge has done in his very careful judgment in this case, and as I read it it is not open to the adverse criticism which Mr. Atkinson addressed to it. In the early part of his reserved judgment the learned county court judge puts briefly the contentions before him. He first puts the contention for the applicant. Counsel for the applicant, he says, relied on certain cases, and then he contended that the employment here was not of a casual nature, the engagement being for a fixed definite period of a fortnight. That was only one of the circumstances relied upon, but the contention was that the employment was not of a casual nature. Then the learned county court judge puts forward the contentions of counsel for the respondent who also relied on various cases which he referred to. Then he contended that the employment was for a fortnight only; it was not permanent; it was not periodical and was only a temporary appointment, and was, therefore, of a casual nature, not by reason only of the circumstances mentioned, but on all the facts and circumstances of the case. When the learned county court judge says, "I am of opinion that this contention is right," he is not adopting the whole of the contentions on either side but merely the result, the contention being on behalf of the applicant that the employment was not casual and on behalf of the respondent that it was. I do not understand him as adopting the contention that because the employment was neither permanent nor periodical, but temporary, therefore it was of a casual nature. I think that is made clear by the subsequent part of the judgment where he refers to the various tests that have been suggested. After having considered the decided cases and applying them to the present case he says: "By every test I have tried the employment of the applicant was of a casual nature." Then he refers to various tests which have been suggested, not one of them in itself conclusive, but all having some bearing upon the case. Then he refers to the language used by Hamilton L.J. with regard to this case being something midway between

the employment of a regular cook and a simple engagement for a single day. It was neither one nor the other. Then on the whole facts of the case he comes to the conclusion that it was on the casual side of the line dividing casual from regular employment. I am clearly of opinion that this case was near the line. It was an arguable debatable case on all its facts, and that being so the learned county court judge in a very careful and well-reasoned judgment comes to the conclusion that it fell on the casual side of the line. That was a question of fact for him to determine, and in my opinion his judgment cannot be interfered with. I think the appeal fails.

WARRINGTON L.J. I am of the same opinion. The question is whether the employment of the applicant in the present case was of a casual nature. [The Lord Justice then read the passage from the judgment of Hamilton L.J. in *Knight* v. *Bucknill* (1), which is set out above in the judgment of the Master of the Rolls, and continued :] That seems to me to be an expression of opinion which must guide us in the present case, and with the greatest respect I associate myself with it. It seems to me quite impossible to formulate any definition of this word "casual" which will be of a satisfactory character. The judge in each case must on the evidence before him, and having regard to all the material circumstances, looking at the matter from the point of view of the people who are familiar with the relations in question, say whether or not the employment is of the nature described. When the judge has done that, then unless the Court can say that the employment clearly falls on the side opposite to his conclusion, it seems to me that the decision of the county court judge ought not to be interfered with.

That the present case does not so clearly fall upon one side or the other as not to be the subject of debate is abundantly clear. So far then I should have been of opinion that the judgment of the county court judge could not be interfered with for the reasons I have stated, but there is one other

(1) 6 B. W. C. C. 160.

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consideration which must not be forgotten. The county court judge may, contrary to what I think he ought to do, adopt some one test, and say that because that test is or is not satisfied therefore his decision is to be one way or the other. If he does that, and if that test is incorrect, then it would amount to a misdirection; his judgment would depend upon it and for that reason could not be sustained. It is said that the county court judge has done that here. I do not think so. What is suggested is that because he has said that he accepts the contention of the respondent that the employment was neither permanent nor periodical but temporary only, and was therefore of a casual nature, therefore he accepts not only the result of the contention—namely, that the employment was casual—but every step by which it is arrived at, and in particular that step by which permanent employment is contrasted with casual. But looking at the rest of the judgment I think it is quite clear that that was not so, and for that reason I think one ought to look at the short note which he made at the end of the argument, not only at the later one. There he says after referring at length to the cases cited: "I hold that the engagement of the applicant was of a casual nature, being only"—now mark this; this is the circumstance which impressed itself on my mind—"the calling in of a woman, not part of the respondent's regular establishment, to do a particular job as and when the necessity arises." That is the circumstance which strikes him. Then when he gave his considered judgment after referring to the several contentions on either side which I have already mentioned, he proceeds to examine the authorities, and to see on which side under those authorities this particular case falls, and he sums it up at the end by giving not one (the one which has been referred to) but three separate circumstances which, in his mind, bring it on the side which he thinks it ought to fall.

In my judgment the learned county court judge has not done that which I am quite sure he would never dream of doing. Having just read, as he had, the passage from the judgment of Hamilton L.J. which I have referred to, he has

not adopted some one particular element and said, "Now that is conclusive." I am quite sure that that was not the intention with which he prepared this note. For these reasons I think the question has been determined by the county court judge without misdirection, and we ought not to interfere. I purposely avoid saying whether I think the county court judge has arrived at the conclusion at which I should have arrived, because it seems to me to be wholly irrelevant to do so.

DUKE L.J. Mr. Atkinson submitted to the Court in the first place that this was a case in which the judgment ought to be set aside and judgment entered for the applicant by reason of the admitted character of the employment. I cannot agree with that view. If the employment was such that it could not be held to be of a casual nature the proposition which Mr. Atkinson makes must necessarily be accepted, but this was not an ordinary contract of domestic service. It was a contract of a special kind as to which having regard to all its elements two reasonable men might well differ as to whether the employment was of a casual nature or not. The learned county court judge here held it was employment of a casual nature. Whether I should have held the same is immaterial. I have only to see in the first place that the learned county court judge had facts before him which admit, upon a proper view, of his coming to that conclusion.

Mr. Atkinson's second submission was that the learned judge misdirected himself, and he said there are certain indications in the judgment which show that if the learned county court judge had not misapprehended the effect of the Act of Parliament and the decisions upon it he would very likely have found the other way. There is a mode of reading the learned county court judge's judgment which at first sight gives some support to that contention, but when the whole of the note is read and the process which the learned county court judge has followed is borne in mind, I think it is quite clear that he did not apply an arbitrary test which would have been fatal to his decision, and that he did consider the

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various elements of the contract of employment. I rather think it would have been a misdirection if the learned county court judge had proceeded upon a supposed rule that a householder is, as a matter of law, exempt from liability to compensation in the case of a servant added to the household for a short defined period of time. When you have fair regard to the whole of the learned county court judge's judgment you see that he gave attention not only to the particular matter of the short period of the employment but to a variety of other matters which he would not have taken into account at all if he had been applying an arbitrary rule, and if he had misdirected himself. As a county court judge of very great experience who has had before him the cases which show what is the proper course for a right decision in a controversy of this kind, he was of course capable of applying them, and I am satisfied he did apply them. On these grounds I think the appeal must fail.

Appeal dismissed.

Solicitors for appellant: *Oswald Hickson & Field.*
Solicitors for respondent: *Barlow, Barlow & Lyde.*

G. A. S.

[IN THE COURT OF APPEAL.]

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Jan. 24, 27.

MARSHALL *v.* CLAYTON & SHUTTLEWORTH.

Employer and Workman—Compensation—Injury from Accident—Loss of Finger—Neurasthenia—Whether due to Accident—Practice—Declaration of Liability—Time for applying for—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 1, 16.

A declaration of liability can be made either on an original application by a workman or as an alternative to a claim by him for compensation, or on an application by the employer to review weekly payments, but such declaration should be applied for as early as possible. It may be applied for by letter before arbitration proceedings are instituted as an alternative to an ordinary application for compensation, but in any case it ought not to be applied for at a later stage in the proceedings than the opening of the case before any evidence is called. It is too late to apply for it after an award has been made.

On January 2, 1918, the applicant, a workman, was injured by an accident which admittedly arose out of and in the course of his employment, and which resulted in the loss of one of his fingers. Up to July 11 he received from his employers the maximum compensation. On July 11 he returned to work for the employers, who found him light work, and remained with them till July 17, when he left owing to his incapacity to continue the work. Upon a claim for compensation commencing from July 17, during incapacity, on the ground that he was suffering from neurasthenia caused by the accident, and was unable to do any work, the county court judge found that the applicant was not incapable for work, either totally or partially, through the injury to his hand, but that the incapacity from which he was admittedly suffering was caused by his brooding over the effects of the accident, and that this brooding had caused him to suffer from neurasthenia. The maiming had not caused any incapacity for work, nor prevented him from earning the same wages as he earned before the accident. His present condition was due entirely to himself. The judge accordingly made an award in favour of the respondents. After the award had been made counsel for the applicant applied to the judge for a declaration of liability, which was refused:—

Held, on appeal, that there must be a new trial on the ground that there was no evidence to support the finding of the county court judge that the neurasthenia was due to brooding over the effects of the accident, but that the application for a declaration of liability was too late.

APPEAL from an award of the judge of the Lincoln County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

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On January 2, 1918, the applicant, a workman in the employment of the respondents, Messrs. Clayton & Shuttleworth, whilst engaged in moving castings on a handcart, took hold of the wheel of the cart to move it, and his left hand was caught and injured. Blood poisoning supervened, and ultimately on April 12 it was found necessary to amputate the second finger. It was not disputed that accident arose out of and in the course of the applicant's employment. He was laid up by reason of the accident until July 11 and down to that date was paid the full statutory compensation, that is to say, the maximum amount of 1*l.* a week with the 5*s.* war bonus, so that he received 25*s.* a week from the date of the accident down to July 11. On July 11 he returned to his employers, who found light work for him, and remained with them until July 17, when he left owing to his incapacity to continue the work. In his evidence he stated that he tried the light work for six days but was unable to continue it. During the time he was so engaged he suffered from dizziness; that part of his work consisted in carrying from the varnish shop to the stores certain wooden aeroplane ribs or spars, a distance of some 40 yards, and had to go 15 steps down; that he used a hand-rail to assist him in going down; that at the end of the six days he was unable to continue that work and had ever since been wholly incapable of any work. On September 17, he made a formal claim by letter upon his employers for compensation. His solicitors writing on that date said: "The applicant started light work on the 11th July, but a few days later had to give it up on account of dizziness. He is now suffering from traumatic neurasthenia and unable to do any work." On September 20 the present application for arbitration was filed.

The county court found that the applicant was not incapable for work, either totally or partially, through the injury to his hand, but that his inability to work of which he complained was caused by his brooding over the effects of the accident and that this brooding had caused him to suffer from neurasthenia. It was true that he had lost a finger. The amputation doubtless was necessitated by the accident, but the maiming

had not caused any incapacity for work nor prevented him from earning the same wages as he earned before the accident. His present condition was due entirely to himself. The county court judge accordingly made his award in favour of the respondents.

After the award had been made counsel for the applicant asked for a declaration of liability. The judge refused the application.

The applicant appealed.

Sir Ellis Griffith K.C. and *J. P. Lockwood* for the applicant. There is no evidence to support the findings of the county court judge. The foundation of his award was that the applicant's incapacity for work was due to his brooding over the effects of the accident. There was no evidence of that. There was merely a suggestion by one of the medical witnesses that "brooding" might cause neurasthenia. The judge was misled by *Holt* v. *Yates and Thom* (1), but this case is very far removed from that, which was not a case of neurasthenia. The award cannot stand, and there ought to be an award in favour of the applicant.

The application for a declaration of liability was wrongly refused: *Owners of the Vessel Tynron* v. *Morgan* (2); *Birmingham Cabinet Manufacturing Co.* v. *Dudley* (3); *Griga* v. *Owners of the Ship Harelda.* (4) Here there has been an amputation of a finger and a permanent alteration of the applicant's earning capacity, and the judge has nevertheless held that his earning capacity has not been diminished. The judge did not apply his mind as he ought to have done to the consideration of the question of potential incapacity of the applicant in the future. He had no jurisdiction under the Act to terminate the weekly payments unless he was satisfied that the incapacity resulting from the injury had finally disappeared: *Taylor* v. *London and North Western Ry. Co.* (5); *Dempsey* v. *Caldwell & Co.* (6); *Chapman* v. *Sage & Co.* (7); *Jackson* v. *Hunslet Engine Co.* (8)

(1) (1909) 3 B. W. C. C. 75, 80.
(2) [1909] 2 K. B. 66.
(3) (1910) 3 B. W. C. C. 169.
(4) Ibid. 116.
(5) [1912] A. C. 242.
(6) (1913) 7 B. W. C. C. 823.
(7) (1915) 8 B. W. C. C. 559.
(8) Ibid. 584.

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It is competent to the Court to make a declaration of liability either upon an original application or upon an application to review: *Green* v. *Cammell, Laird & Co.* (1)

[SWINFEN EADY M.R. If the applicant wishes to have a declaration of liability made he ought to ask for it at the earliest possible moment. It ought not to be asked for after judgment has been pronounced.]

In none of the reported cases has the workman asked for a declaration of liability as an alternative to a claim for compensation. If the applicant now fails to obtain a declaration of liability he fails altogether as he will never have opportunity of obtaining compensation in the future.

[DUKE L.J. *Chandler* v. *Smith* (2) seems to be the first case in which it was said that a declaratory order was the right order to make.]

In practice an application for a declaration of liability is never made as an alternative to a claim for compensation. The point as to a declaration of liability was no new point to the respondents at the hearing.

[They also referred to Form 1 of "Specimens of Agreements to be filed under Sched. II. (9.)" in Adshead Elliott's Workmen's Compensation Act, 7th ed., p. 719.]

Rigby Swift K.C. and *C. E. Dyer* for the respondents. The award of the county court was right and ought not to be disturbed. The onus was on the applicant to prove that the condition he was in on November 12 when he made his application to the county court judge was brought about by the accident on January 2. None of the doctors say so. Neurasthenia often arises from causes other than physical.

The only question here is whether the county court judge has misdirected himself on a question of law. Unless he has done so the Court will not interfere. It cannot be said that the neurasthenia is so clearly connected with the accident that the judge was wrong in saying that it was not caused by the accident. At the arbitration the onus of proof was on the applicant to prove his case from beginning to end.

(1) [1913] 3 K. B. 665, 668. (2) [1899] 2 Q. B. 506.

[SWINFEN EADY M.R. referred to *Brown* v. *Kent*. (1) In *Bower* v. *Meggitt* (2) it was held that the onus rested on the employer to show that the continuance of the incapacity of which the man there complained was not due to the original accident, but to novus actus interveniens.]

[*Duke L.J.* In that case (2) Scrutton L.J. founded his judgment on *Marshall* v. *Orient Steam Navigation Co.* (3)] It is submitted that here the applicant has not proved any connection between the neurasthenia and the accident. The onus was on him to prove that the present state of his nervous system was brought about by the accident and the amputation which followed it: *Withers* v. *London, Brighton and South Coast Ry. Co.* (4) See also *Barnabas* v. *Bersham Colliery Co.* (5) The onus being on the workman there must be something to shift it. Here there is nothing. If the Court were to hold in this case that the neurasthenia was caused by the accident it would open the door to the suggestion that whenever neurasthenia followed an accident it was caused by the accident. The county court judge's award is one that could not have been disturbed if he had given no reasons for it. There was evidence both ways.

The Court is asked to make an award continuing the weekly payments, but it is submitted it ought not to do so unless it has evidence before it to justify it in so doing.

The case for the applicant is put in two ways. It is contended either (1.) that he is entitled to compensation in respect of the neurasthenia as being caused by the accident, or (2.) that the injury resulting in the loss of a finger entitles him to a declaration of liability. As regards the latter contention it is said that in every case in which a workman has received an injury of a permanent character whether there has been amputation or not there ought to be a declaration of liability. It is submitted that this is not so. The cases relied on were mostly cases of rupture, and in those cases the Court will take judicial notice of the fact that rupture is always likely to recur:

(1) (1913) 6 B. W. C. C. 745.
(2) (1916) 10 B. W. C. C. 146.
(3) [1910] 1 K. B. 79.
(4) [1916] 2 K. B. 772.
(5) (1910) 4 B. W. C. C. 119.

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Wardell v. *Cargo Fleet Iron Co.* (1) In the following case the arbitrator was held to be right in refusing to make a suspensory award: *Goodall and Clarke* v. *Kramer* (2); *Harlock* v. *Owners* of *S.S. Coquet* (3); *Watson* v. *Wm. Beardmore & Co.* (4); *Leverington* v. *A. Dodman & Co.* (5) It is clear on the authorities that the question whether or not a declaration of liability should be made is one for the county court judge to decide.

Green v. *Cammell, Laird & Co.* (6) precludes the respondents from saying that the applicant was not entitled to ask for a declaration of liability. But he did not make his application until after his application for compensation had been dismissed with costs. He was then too late. The question of neurasthenia having been disposed of there is nothing in the evidence given to enable the Court to say that the county court judge ought as a matter of law to have made a declaration of liability. There was no evidence as to incapacity or of probable future incapacity.

Sir Ellis Griffith K.C. replied.

SWINFEN EADY M.R. This is the appeal of the applicant from the decision of the learned judge of the Lincoln County Court making an award in favour of the respondents, the employers. The learned judge found in favour of the respondents on the main application, and he also, when it was applied for at the conclusion of his judgment, refused a declaration of liability.

The applicant appeals and insists that the award ought to have been made in his favour upon the evidence before the learned judge, and that even if he was wrong in that, in any case the learned judge ought to have made a declaration of liability. [His Lordship stated the facts and continued:] The learned county court judge found upon the evidence that the applicant was incapable of work, and there appears to have been no dispute with regard to that, the evidence was all one way. But complaint is made of the finding of the

(1) (1916) 10 B. W. C. C. 124.
(2) (1910) 3 B. W. C. C. 315.
(3) (1914) 7 B. W. C. C. 88.
(4) (1914) Ibid. 913.
(5) [1916] 1 K. B. 964.
(6) [1913] 3 K. B. 665.

county court judge as to the cause to which that inability to work was to be attributed.

[His Lordship then referred to the findings of the county court judge and continued:] That he is suffering from neurasthenia and has certain distressing symptoms is not in dispute; the question is to what is that neurasthenia attributable? Is it, as the applicant alleges, traumatic neurasthenia resulting from the wound and the injury that he received? or is it, as the respondents allege, caused by the man brooding over his troubles and that brooding bringing on neurasthenia?

[His Lordship then referred to the evidence of the medical witnesses and continued:] There is no evidence that it was brooding which brought on the neurasthenia. At most the only answer that I can find bearing upon the question of brooding at all is an answer given by one of the doctors, Dr. Steele, in cross-examination in which he said that the applicant might have brooded over the amputation; that is all, not that he did, and that was the doctor who amputated the finger.

Under these circumstances I think it is quite impossible that the finding of the learned county court judge that the man's inability to work was caused by his brooding over the effects of the accident and that that brooding had caused neurasthenia can stand. It is a finding which there is no evidence to support. That is the key to all the rest of the judgment. That the man is incapable of work is conceded. The rest seems to follow from the conclusion at which the learned judge has arrived, and I am of opinion that that finding of fact as to what has caused the present condition of the man cannot be supported and that the award must be set aside.

The applicant asks us to make an award in his favour, but there is a great difficulty in doing that. How can we say that the learned judge ought to have adopted the view that the man's condition was attributable to the accident and find that as matter of fact? There was evidence, no doubt, in support of it, but there was evidence the other way, and, that

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being the state of the evidence, I am of opinion that all we can do with reference to that is to set aside the award and send the case for a new trial.

Then there is another part of the case with regard to the application for a declaration of liability. I think it is established by the authorities to which reference has been made that such a declaration can be made as well on the application of the workman as on the application of the employer. The application of the employer is made under par. 16 of the Schedule I. Where an employer applies to end, diminish or increase any weekly payment an order can be made for a declaration of liability, but in my opinion that declaration should be applied for as early as possible. It may well be applied for by letter before arbitration proceedings are instituted, and then it gives the employer an opportunity of acceding to it out of court. Or it may be applied for on an ordinary application for compensation when the case of the applicant is opened—that is to say, the applicant may ask for the compensation he claims or in the alternative for a declaration of liability. But in my judgment it ought to be asked for, and I hope in future will be asked for, at a stage not later in the proceedings than the opening of the case, because it is a matter in regard to which evidence is admissible, and in most cases would be material, and I think it ought to be considered as quite too late where an applicant does not ask for that relief until after the award has been made.

The principle upon which these declarations of liability are made is this, that a workman may have received an injury of a permanent nature which may in the future develop and lessen his earning capacity, and if it develops under ordinary circumstances without the interposition of any fresh accident then it would be right probably to consider that the loss of earning capacity when it supervenes would be the consequence of the accident. That is the principle, but whether there is any probability of any future development of the injury would be a question of fact in each particular case. In some cases the injury, although of a permanent character, such as the loss of a finger or a toe, might be such that, humanly

speaking, there would be no probability of any further development of the injury, and the man notwithstanding the loss of the finger or toe might be as fully capable of doing the work that he previously did as if the accident had not happened. It is not a matter of law that wherever a man has received an injury of a permanent character, such as the loss of a finger, a toe, or a limb, there must necessarily follow some declaration of liability. It would depend on the facts of each case and upon the evidence adduced with regard to it, and that is why the claim should be made at an early stage and certainly not after an award has been made. Even where a man has sustained a rupture it is not, in my judgment, a matter of course that he should be entitled to a suspensory award. There should be some evidence to justify such an award being made; there should be some evidence that the man is likely to suffer again in the future from the result of the injury; and that being so the application should be made before the evidence is called in order that the tribunal may have that point in mind, and the parties may have it before them when they are adducing and considering the evidence in the case. That has not always been done in the past; no doubt in the past applications have been made after judgment, and so with regard to the present case I think it will be sufficient to say that the application for a declaration of liability, if it is now claimed by the applicant, should be claimed at the hearing of the proceedings at the new trial. All that we can do on the present occasion is to discharge the order below and direct the case to go for a new trial. In going for a new trial it will follow the ordinary course of being tried in some other and convenient county court in the neighbourhood.

WARRINGTON L.J. I am of the same opinion. As we are sending the case down for a new trial it is desirable to say as little as may be about the merits of the case. The ground on which I come to the conclusion that there ought to be a new trial is this, that the learned county court judge has based his finding on this, that the incapacity from which admittedly the applicant was suffering was not caused by the injury arising

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out of the accident, but was caused by his brooding over the effects of the accident, and that this brooding had caused him to suffer from neurasthenia, and that his present condition was due entirely to himself. In my opinion there was not a scrap of evidence to support that finding. There was a suggestion on the part of one of the doctors that he might have brooded over his accident, but there was no evidence at all to justify the learned county court judge in coming to the conclusion that he had, and still less that brooding was the cause of the neurasthenia with this consequent incapacity. That being so, the fact on which the learned judge bases his main finding being swept out of the way, there is nothing upon which that finding can rest. It seems to me that on that ground the present award is so unsatisfactory that it must be set aside. I am not prepared at the present moment to go further and to say that the award ought to be made in favour of the applicant, because there was evidence on both sides, and, if the learned county court judge had not allowed himself to be misled as he did, it is quite possible that a finding by him against the applicant might have been supported. I say no more than that.

As to the other point, I desire to associate myself with what has been said by the Master of the Rolls as to the time at which any such application should be made. The question, having regard to the view we take, really does not arise in the present case, and it is, therefore, unnecessary to say anything more about it.

DUKE L.J. I agree. The learned county court judge had before him evidence as to the character of the disability under which the applicant was suffering, the time and manner in which the disability arose, and the circumstances which tended to associate the disability with, or dissociate it from, the accident which he suffered upon which it was properly open to him to come to a conclusion either way, and I do not desire to express any opinion as to which was the more proper or reasonable conclusion to be arrived at under the circumstances. But instead of dealing with those matters the learned county

court judge seems to have relieved himself of the true difficulty in the case by directing his attention to the supposition that the applicant had brought about the state of neurasthenia by brooding, for which, as has been pointed out, there was no substantial ground on the evidence in the case. For that reason the award of the learned judge cannot stand, and there must be a new trial.

On the other matter which has been referred to I agree that if a declaratory order is to be made there ought to be an application for it at some proper time so as to make it practicable to give any evidence which may be relevant to the matter, and there ought to be some real ground for making it arising out of the condition of the applicant and a reasonable prospect or probability of action upon this declaration at some future time.

Appeal allowed and new trial ordered.

Solicitor for applicant: *John J. Hands for Benno Pearlman, Hull.*

Solicitors for respondents: *Neave, Morton & Co. for Page & Porter, Lincoln.*

W. I. C.

C. A.
1918
Dec. 12.
1919
Jan. 31.

[IN THE COURT OF APPEAL.]

WELD-BLUNDELL *v.* STEPHENS.

[1917 W. 908.]

Principal and Agent—Confidential Instructions—Duty of Secrecy—Breach of Duty—Libel—Damages—Indemnity—Ex turpi causa non oritur actio.

The plaintiff, who had lent money to a certain company, being asked for a further advance, employed the defendant, a chartered accountant, to look into the affairs of the company. In a letter of instructions to the defendant the plaintiff inserted libellous statements concerning the former manager and an auditor of the company. The defendant handed the letter to his partner, who negligently left it at the company's office. The manager found it, read it, and communicated its contents to the two persons defamed, who sued the plaintiff for libel and recovered damages against him, the jury in each case finding that the writer of the letter was actuated by malice.

The plaintiff then sued the defendant for breach of an implied duty to keep secret the letter of instructions. The jury having found that it was the duty of the defendant to keep the letter secret, that he had neglected this duty, and that the actions of libel and the damages recovered therein were the natural consequence of his negligence:—

Held, by the Court (Bankes, Warrington, and Scrutton L.JJ.) that it was the duty of the defendant to keep secret the contents of the letter.

Judgment of Darling J. [1918] 2 K. B. 742 reversed on this point.

Held, by Bankes and Warrington L.JJ. (Scrutton L.J. dissenting) that the plaintiff could recover nominal damages and no more for the breach of this duty, any further damages being in the nature of an indemnity for the consequences of his own wilful wrong.

Judgment of Darling J. affirmed on this point.

By Scrutton L.J. that the plaintiff was entitled to substantial damages.

APPEAL from the judgment of Darling J. reported [1918] 2 K. B. 742.

The plaintiff had in time past advanced and become liable for considerable sums of money to and at the request of a company known as the Float Electric Company, of which one Lowe was formerly the manager and one Comins the auditor. The defendant was an accountant who had long been known to the plaintiff and who had on former occasions advised him professionally in financial matters.

Early in the year 1915 one Hirst, who was then the manager

of the Float Electric Company, applied to the plaintiff for a further advance of money on behalf of the company. On May 4, 1915, the plaintiff wrote to the defendant asking him to look into the affairs of the company and see whether there was either "sense or safety in lending any more money or throwing good money after bad." In the course of his letter he said that Hirst's predecessor Lowe, "an ingenious thief with the help of the rest of the gang B., H. A., and C. managed by just the same manœuvres and pretexts to get two or three thousands."

The defendant on receiving this letter handed it to his partner, who went with it to the company's bankers and from thence to the office of the company. There he negligently left it. Hirst found it, read it, and communicated its contents to Lowe and Comins, who thereupon brought actions of libel against the plaintiff. In each action the judge ruled that the letter was written on a privileged occasion and the jury found that the writer was actuated by malice. At neither trial did the defendant to the action appear. Lowe obtained a verdict for 1000*l.* which was subsequently reduced by consent in the Court of Appeal to 350*l.* Comins obtained a verdict for 500*l.*

The plaintiff then brought the present action against the defendant to recover as damages the sum which he had to pay as damages and costs in the two actions for libel, amounting with his own costs to 1680*l.*, as upon a breach by the defendant of an implied obligation to keep secret the confidential instructions contained in the letter of May 4, 1915. The case was tried before Darling J. and a special jury. The learned judge left three questions to the jury: (1.) Was it the duty of the defendant to keep secret the letter of May 4, written by the plaintiff to the defendant? (2.) Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr. Hirst? (3.) Were the actions brought by Lowe and Comins against the plaintiff, and the damages recovered by them, the natural consequence of the proved negligence of the defendant? The jury answered all three questions in the affirmative and assessed the damages at 650*l.*

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Darling J. on further consideration held that the contract between the parties did not contain any such implied term as that alleged by the plaintiff, and that therefore the defendant had committed no breach of duty towards the plaintiff. The learned judge further held that the plaintiff could not recover damages which would indemnify him for the consequences of his own wrongful act.

Judgment was accordingly given for the defendant.

The plaintiff appealed. (1)

Langdon K.C., *J. B. Matthews K.C.* and *E. F. Lever* for the appellant. The jury have found that it was the duty of the respondent to keep secret the letter of May 4. The first question is whether Darling J. was right in holding that the law cannot imply such a duty. There can be no doubt that it is the duty of a confidential agent to respect the confidence reposed in him: *Robb* v. *Green*. (2) An overriding public duty may justify a breach of the confidence, such as the duty to bring a criminal to justice. But it cannot be established that this letter was a criminal libel; and there is no public duty to give information of merely civil injuries. Furthermore, this letter was written on a privileged occasion, and, though two juries have since found that the writer was actuated by malice, there was no such finding at the time when the respondent accepted the mandate it contained. Being written on a privileged occasion it was not prima facie actionable, and the implied promise on the part of the respondent to take reasonable care to keep secret its contents violated no public policy. There is nothing therefore to disturb the finding of the jury that it was his duty to keep the letter secret.

The jury have also found that the respondent neglected this duty, and that the disclosure to Mr. Hirst of the contents of the letter, the actions which followed, and the damages recovered therein were the natural consequence of the negligence.

The appellant is entitled to judgment for the amount of the verdict.

(1) There was a cross-appeal by the respondent, but it raised no point of any importance.

(2) [1895] 2 Q. B. 315.

D. M. Hogg K.C. and *Patrick Hastings* for the respondent. The duty which a confidential agent owes to his principal does not entitle the principal to claim protection from the consequences of his own crimes or malicious torts. The agent is bound to take reasonable care of his principal's documents as a bailee for reward, that is to say documents handed to him in the usual and proper course of business; but he does not undertake to keep secret the evidence of crimes or wilful wrongs committed by his principal. The relation of a solicitor to his client is more confidential than that of an accountant to his employer, yet the duty of a solicitor not to disclose matter communicated to him in confidence "cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice": *Reg.* v. *Cox and Railton.* (1) If a confidential communication to an agent discloses a fraud by the principal, no duty towards his principal binds the agent to conceal the fraud. "There is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist": *Gartside* v. *Outram.* (2)

The same principle applies if a libel is substituted for a fraud: *Saunders* v. *Seyd and Kelly's Credit Index Co.* (3)

Any agreement to keep these libels secret would be against public policy and void. The offences had been committed; the libels upon Lowe and Comins had been written and published to the respondent; and both causes of action were complete before or when the alleged agreement was made. An agreement to keep secret the evidence of the wrong could not be sued upon. "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act": *Holman* v. *Johnson* (4), per Lord Mansfield C.J. "If the evidence adduced

(1) (1884) 14 Q. B. D. 153, 167.
(2) (1856) 26 L. J. (Ch.) 113, 114.
(3) (1896) 75 L. T. 193.
(4) (1775) 1 Cowp. 341, 343.

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by the plaintiff proves the illegality the Court ought not to assist him": *Scott* v. *Brown, Doering & Co.* (1), per Lindley L.J. "If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action" (2), per A. L. Smith L.J.

Any damages recovered by the appellant would be pro tanto an indemnity for the consequences of his wilful wrong. Such an indemnity the law does not permit: *Colburn* v. *Patmore* (3); *Shackell* v. *Rosier* (4); *W. H. Smith & Son* v. *Clinton* (5); *Burrows* v. *Rhodes* (6); *Leslie* v. *Reliable Advertising and Addressing Agency.* (7)

Langdon K.C. in reply.

Cur. adv. vult.

Jan. 31. The following written judgments were delivered.

BANKES L.J. This is an appeal from a judgment of Darling J. who held that the action brought by the appellant against the respondent was not maintainable. The circumstances of the case are peculiar, and the point raised is an important one. Prior to the month of May, 1915, the appellant had apparently lost a large sum of money in connection with various undertakings, and in that month the manager of a company known as the Float Electric Company, in which the appellant was largely interested, applied for a further advance of money. This apparently annoyed the appellant, and he then wrote a letter to the respondent dated May 4, 1915, which subsequently became the subject of proceedings for libel against him. The immediate object of the letter was to request the respondent, who was an accountant, and who had been previously employed by the appellant to conduct confidential inquiries for him, to look into the affairs of the Float Electric Company and to see whether there was either "sense or safety in lending any more money or throwing good money after bad.' The letter went on to speak of the previous manager of the

(1) [1892] 2 Q. B. 724, 728.
(2) Ibid. 734.
(3) (1834) 1 C. M. & R. 73.
(4) (1836) 2 Bing. N. C. 634.
(5) (1908) 99 L. T. 840.
(6) [1899] 1 Q. B. 816.
(7) [1915] 1 K. B. 652.

company as an ingenious thief, and of other officials of the company as the "rest of the gang." The letter also clearly indicated the writer's opinion that the then manager of the company might prove to be no better than his predecessor. It is obvious from a perusal of the terms of the letter that any person in the position of the respondent must have recognized at once that he was asked to accept a delicate and extremely confidential task; and further that the language in which the writer had expressed himself, even if written on a privileged occasion, was such as would be likely to occasion considerable trouble if it got to the ears of the persons attacked.

That the respondent realized the position was made quite clear by his evidence at the trial. He admitted that it was part of his duty to take care of the letter, and to take reasonable precautions to the best of his ability to protect the appellant's interests. He also admitted that he realized the dangerous nature of the letter, and that there was no necessity for any one to take the letter to the offices of the Float Electric Company, though it was necessary in his opinion that it should be taken to the bank in order to satisfy the bank manager as to his authority to inspect the company's account there. What in fact happened was that the respondent handed the letter to his partner with instructions to go to the bank and to the company's offices, and to make inquiries; but he gave him no special warning with regard to the letter. The partner was so careless that he dropped the letter in the company's office, where it was found after his departure by the manager, who communicated the contents of the letter to a Captain Lowe and to a Mr. Comins, two of the persons who were included in the charges contained in the letter. Each of these gentlemen brought an action for libel against the appellant. In neither action did the appellant appear at the trial. In both actions the learned judge ruled that the occasion was privileged, but the jury found that the appellant was actuated by express malice. In the one case the jury awarded 1000*l.* damages and in the other 500*l.* On appeal to this Court the verdict in the first case was reduced to 350*l.* by consent.

The present action was brought by the appellant against the

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respondent to recover as damages the amount which he had to pay as damages and costs in those two actions which including his own costs amounted to 1680*l*. The appellant's case was that he had employed the respondent in a confidential capacity as his professional adviser and that it was an implied term of his employment that he should keep secret all communications and instructions received from the appellant, and should not permit such communications and instructions to be disclosed or published to others. The learned judge after an extremely clear and careful summing up left three questions to the jury. (1.) Was it the duty of the defendant to keep secret the letter of May 4, written by the plaintiff to the defendant? (2.) Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr. Hirst? (3.) Were the actions brought by Lowe and Comins against the plaintiff, and the damages recovered by them, the natural consequence of the proved negligence of the defendant? The jury answered all three questions in the affirmative and assessed the damages at 650*l*.

The appellant's case was really founded upon the negligence of the respondent's partner in not taking proper care of the letter, as a consequence of which the contents of the letter became known to the persons who subsequently brought actions for libel against him. The respondent met that case by asserting that he was under no duty not to disclose the contents of the letter, because any contract not to do so would be either an illegal contract, or against public policy, and consequently unenforceable; and upon the further ground that no damages were recoverable because the damages claimed were the direct result of the appellant's own wrong. The learned judge decided both points in favour of the respondent. Upon the first point he says (1), "After much consideration I have, however, come to the conclusion that our law does not, and cannot, imply any such promise or term as that which the plaintiff alleges, and that therefore no breach of contract or dereliction of duty was committed by the defendant." I am

(1) [1918] 2 K. B. 748.

unable to agree with the view thus expressed by the learned judge. There may no doubt be cases to which the rule laid down by the learned judge may be applied, as for instance confidential communications to a professional adviser as to the proposed commission of a crime, or as to the proposed commission of a civil wrong upon an individual. A contract to keep such a communication secret may well be considered as an illegal contract, and the duty to the public to disclose the criminal or illegal intention may properly be held to override the private duty to respect and protect the client's confidence. Apart from the special nature of the jurisdiction which was invoked in the case of *Gartside* v. *Outram* (1) (a case which was much relied upon by Mr. Hogg) I think that that case falls within the class of cases to which I have alluded, and which are entirely distinct in their nature from the present case, where the wrong is completed before the communication is disclosed, and where, as I think, public policy is better served by respecting the confidence than by abusing it. It needs only to put two instances to illustrate my meaning. In the one case a patient informs his doctor that he intends to commit suicide at such and such a place at such and such a time. In the other case a person who is charged with attempting to commit suicide tells his solicitor that he did so attempt and asks him to defend him. A distinction must also I think be drawn between the present case, which, upon the argument presented to us, must be treated as a case where a person engaged in a professional capacity volunteers to disclose confidential communications made to him by his client, and cases where a person is compelled by process of law to disclose such communications. No contract would be implied as between a professional man and his client not to disclose communications if required by process of law to do so, whereas a contract might well be implied not to disclose the same communications voluntarily.

Mr. Hogg contended that for the purpose of considering the respondent's duty in the matter, the appellant's letter must be treated as a criminal libel, and the appellant himself as having

(1) 26 L. J. (Ch.) 113.

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been guilty of a crime, and that no contract to conceal a crime could be lawful. In the first place I do not agree that a contract not to disclose the fact that a crime has been committed is necessarily either illegal or against public policy, and I need only refer to the instance I have already mentioned of a solicitor employed to defend a prisoner to whom the prisoner admits that he has committed the crime with which he stands charged. In the second place I do not think that the respondent is entitled to treat the appellant as a person who has committed a crime by writing and publishing the libels in question. The parties libelled might possibly have taken criminal proceedings, but they did not do so. They preferred to treat the letter as a civil wrong. If the appellant had been indicted it does not at all follow that he would have been convicted; and unless and until he is convicted he is in my opinion just as much entitled to say that he is innocent of the crime of libel as he was entitled to say, up to the time when a jury found that he had been actuated by express malice, that he had committed no civil wrong. Apart altogether from the distinction which I think exists between the present case and a case such as *Reg.* v. *Cox & Railton* (1), where the question of what communications are covered by the client's privilege was discussed, the passage in the judgment of Stephen J. (2) where he speaks of communications criminal in themselves, and which was much relied upon by Mr. Hogg, has in my opinion no application to the present case, where we are not considering any question of a criminal communication in the sense in which Stephen J. was speaking of such a communication. No direct authority upon this branch of the case appears to exist. In the case of *Saunders* v. *Seyd & Kelly's Credit Index Co.* (3) Lindley L.J. appears to have considered that a contract might lawfully be made not to disclose the contents of a defamatory publication, and contracts of that kind are habitually made between trade societies and their customers with reference to the information supplied as to the credit or antecedents of persons with whom the customers may be concerned in business. It is not

(1) 14 Q. B. D. 153. (2) Ibid. 167.
(3) 75 L. T. 193.

suggested that the publication to the respondent caused any special damage to the persons who ultimately brought actions against the appellant. The contract was one which in no sense encouraged the committing of any wrong. On the contrary its effect must necessarily be to reduce any injury resulting from the wrong already done to a minimum, and to render it unlikely that any breach of the peace could result from the wrong having been committed. Under these circumstances I do not myself see any objection to holding that the contract as found by the jury in the present case was neither an illegal contract nor one contrary to public policy.

I pass now to consider the second question dealt with by Darling J. which in my opinion is the more difficult of the two. It is this: Assuming the appellant to have a right of action against the respondent, is he entitled to recover the special damages which he claims? It is stating the proposition much too broadly to say that under no circumstances can a man recover damages for his own wrong or damages by way of an indemnity for the consequences of his own wrong. A motor-car accident policy commonly includes what are known as third party risks, and this is a familiar instance where such an indemnity is provided for. A man by his careless driving runs over and kills a person walking along the road. That person's wife and family claim and recover damages under Lord Campbell's Act. The risk is covered by the policy, and the driver of the motor-car claims and is entitled to be indemnified. *Trinder, Anderson & Co.* v. *Thames & Mersey Marine Insurance Co.* (1) is an express authority to the above effect in the case of a marine insurance policy. The cases of *Crage* v. *Fry* (2), *Cointat* v. *Myham* (3), and *Burrows* v. *Rhodes* (4), are all instances of cases negativing the existence of any such general rule.

We are not in this case considering, as I have already pointed out, the consequences of the commission of a crime, or any claim for an indemnity against the consequences of the commission of a crime, as was the case in *Leslie* v. *Reliable*

(1) [1898] 2 Q. B. 114.
(2) (1903) 67 J. P. 240.
(3) [1913] 2 K. B. 220.
(4) [1899] 1 Q. B. 816.

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Advertising and Addressing Agency. (1) I do not desire to express any opinion as to whether a person can ever be heard to claim an indemnity against the consequences of a wilful and deliberate wrong committed by himself. Kennedy J. in the passage of his judgment in *Burrows* v. *Rhodes* (2) was apparently of opinion that he could not. I desire to confine my judgment to the facts of this particular case. I do not think that I am at liberty to form my own opinion as to the appellant's conduct in the matter, or as to his motive in writing the letter which was the subject matter of the actions brought against him, or as to whether the persons who brought those actions, or anyone who knew the appellant, attached any real importance to what he said. Two juries have found that the appellant, in writing the letter complained of, was actuated by express malice. There is, of course, the possibility that the juries may have been induced so to find on some ground short of a wilful and deliberate intention to injure. The case of *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (3), is an instance where the Court of Appeal considered that a jury had so found. In that case the verdict of the jury was supported upon the ground that they might have come to the conclusion that the defendant in that case had allowed himself to be influenced by gross and unreasoning prejudice to such an extent as to make aspersions upon other people recklessly as to whether they were true or false. I do not think that I am at liberty to form any opinion of my own as to the grounds upon which the juries acted. I must take the verdicts as I find them. In the eye of the law those verdicts at the least carry this conclusion with them, namely, that even if the appellant was not actuated by a deliberate intention to injure the persons referred to in his letter, he was, to use Lord Esher's language in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (3) abusing the occasion and not using it for any legitimate purpose. Under these circumstances I do not think that the appellant can shelter himself under the

(1) [1915] 1 K. B. 652. (2) [1899] 1 Q. B. 828.
(3) [1892] 1 Q. B. 431.

protection which the law allows to confidential communications. Upon the findings of the jury he clearly overstepped the limits of that protection, and I cannot see any sufficient reason why he should not come within the rule of law as laid down by Kennedy J. to which I have already referred, and which is, I think, in accordance with the reasoning which led to the result arrived at in the recent case of *Neville* v. *London Express Newspaper* (1) in the House of Lords. I think, therefore, that the learned judge was right in saying that the appellant cannot recover any portion of the special damages which he claimed, which are in substance in the nature of an indemnity against the consequences of his own wilful and deliberate wrongdoing, but, as he has proved a cause of action in contract, he is entitled in my opinion to a judgment for nominal damages, but under the circumstances, without costs.

I think the cross-appeal fails. The only ground relied upon was that the damages were excessive. It was said that the appellant acted unreasonably in not appearing at either trial, and that had he done so the damages would not have been so large, and further, that he ought to have accepted the offers of compromise. In my opinion there was no ground for interfering with the verdict on any of the grounds relied on.

The result will be that the appeal will be allowed, and the cross-appeal dismissed, but without costs of the appeals on either side, and that judgment will be entered for the appellant in the action for 20*s.* without costs.

WARRINGTON L.J. The defendant was employed by the plaintiff in a confidential capacity as an accountant, and it is not disputed that it was his duty to take reasonable care that the plaintiff's documents should not be disclosed to other persons. In a letter of instructions written to the defendant the plaintiff inserted libellous statements in reference to two persons named Lowe and Comins. The jury have found that the defendant neglected the duty above mentioned, and in consequence the contents of the letter became known to one Hirst, and through him to Lowe and Comins. They brought

(1) [1919] A. C. 368.

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actions for libel against the plaintiff, they succeeded in displacing a plea of privilege by proving express malice, and they recovered judgments in the one case for 500*l.* and in the other for 350*l.* with costs. The plaintiff seeks to recover the loss and expense which he has thus incurred as damages for the defendant's breach of duty above referred to. The case was tried before Darling J. and a special jury. The jury answered in the affirmative the following questions, namely: (1.) Was it the duty of the defendant to keep secret the letter of May 4 written by the plaintiff to the defendant? (2.) Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr. Hirst? (3.) Were the actions for libel brought by Lowe and Comins against the plaintiff, and the damages recovered by them, the natural consequence of the proved negligence of the defendant? And they awarded the plaintiff 650*l.* damages. The learned judge however entered judgment for the defendant on two grounds: (1.) That there could not in law be an implied contract to keep secret a libellous letter such as that in question; and (2.) that in any case the plaintiff could not recover as damages the loss and expense occasioned by his own wrong doing. The plaintiff appeals, and the defendant has a cross-motion asking for a new trial on the ground of misdirection and excessive damages. The publication relied on in the libel actions was the writing of the letter to the defendant. The cause of action therefore was complete before any default on the defendant's part had occurred.

The first question is, was the defendant under an implied obligation to take reasonable care that the contents of the letter should not be disclosed? The letter was clearly one of the class of documents to which his general obligation as confidential agent extended, and I think it is for him to make out that its nature as a libellous document excludes it from the class. The defendant contends in the first place that the letter was a criminal libel and that it would be contrary to public policy to treat as valid and binding even an express obligation to conceal a crime and a fortiori that the law would not imply such an obligation. There is no direct authority on the point

and, as will be seen, I do not think the question arises, and I prefer to express no opinion upon it except that if the document in question revealed a contemplated crime, the commission of which its disclosure might prevent, I think there would be a duty owing to the public which would override any private obligation. In the present case, however, we are not in my opinion entitled to assume that the letter was a criminal libel. It is not every libel which is criminal, and the question whether a particular libel is so or not is one for a jury. There has here been no prosecution and of course no conviction. The libel was a private wrong towards the persons libelled, and in my opinion for the purposes of this case it must be treated as such and not as a crime.

Is there, then, anything in law to render invalid an obligation not to disclose a document which is libellous, or which contains evidence of a private wrong, or to exclude such a document from the implied obligation as to secrecy cast upon a confidential agent? Reliance was placed upon the judgment of Wood V.-C. in *Gartside* v. *Outram*. (1) In that case the plaintiffs sued for an injunction restraining the defendant, who had been in their employment, from disclosing materials obtained by him in the course of his employment showing that they had conducted their business in a fraudulent manner. They denied the fraud but at the same time alleged that they had been sued by certain persons who had made use of information supplied by the defendant and had recovered damages, and they further alleged that the defendant was threatening and intending to communicate similar evidence to other persons. The defendant by his answer specifically alleged the fraud which he said was evidenced by the materials in question, and he sought to interrogate the plaintiffs with a view to obtaining an admission of the fraud. The Vice-Chancellor allowed the interrogatories holding that if the defendant should establish the charge made against the plaintiffs, he would defeat the plaintiffs' claim in the suit. The Vice-Chancellor, in the course of his judgment, said this (2): "The question is, whether, supposing the case so averred by the answer, definite and

(1) 26 L. J. (Ch.) 113. (2) Ibid. 115.

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precise in all particulars, to be proved or admitted, the plaintiffs are entitled to say there shall be an injunction to restrain the defendant from making a disclosure which may enable others to recover, as Messrs Rathbone have done? I hold that it is a good defence if those facts are made out." It must however be remembered that in that case the plaintiffs were seeking the aid of the extraordinary jurisdiction of the Court of Chancery in enforcing specific performance of the negative obligation of the defendant not to disclose his master's secrets, and as is well known that jurisdiction was not necessarily exercised because the plaintiff might have a right of action at law for breach of contract. Such a plaintiff might be left to his remedy at law if for any reason the Court of Chancery should be of opinion that the extraordinary jurisdiction should not be exercised in his favour. Such was the case where the plaintiff did not, as was said, "come with clean hands." In my opinion the judgment of the Vice-Chancellor may well be read, not as a decision against the alleged legal obligation, but merely as an expression of the opinion of the Vice-Chancellor against the exercise of the equitable jurisdiction. But even if the judgment is of the wider application, it does not cover such a case as the present. The fraud there alleged was a systematic fraud pursued by the plaintiffs in the course of their business, and the disclosure of the evidence in the defendant's possession would tend to prevent such frauds in the future. I doubt whether the Vice-Chancellor would have come to the same conclusion where, as in the present case, the question relates to a single document, the writing and publication of which is no doubt a cause of action, but the disclosure of which serves no useful purpose, except to enable the person libelled to recover damages for a libel, the existence of which, but for the defendant's neglect, might never have been known to anyone.

No other authority in point has been cited to us, but there are expressions in the judgment of Lindley L.J. in *Saunders* v. *Seyd and Kelly's Credit Index Co.*(1) which show that it did not occur to him that there was any objection in law to an obligation

(1) 75 L. T. 193.

not to disclose a libellous document. Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed I can see no distinction in this respect between cases of contract and cases of tort. Unless there be such a distinction, the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal, and I come to the conclusion that the implied obligation of the defendant in reference to the plaintiff's documents in general extended to the letter of May 4, 1915.

There remains, however, the question whether the plaintiff is entitled to recover as damages for breach of the defendant's obligation a sum of money which he was legally liable to pay independently of any act or default on the part of the defendant. In the present case no other damage is suggested, and if those awarded by the jury are not recoverable, then, though there would be a technical breach of the defendant's obligation, the damages would be nominal. If the plaintiff is right, the obligation not to disclose is equivalent to an obligation to indemnify the plaintiff against the liability to pay the amount recovered for damages and costs in an action brought as a consequence of the disclosure. The damages and costs in question are payable by reason of the plaintiff's own wrong-doing, and were legally recoverable from him independently of the defendant's breach of his obligation. Moreover the writing and publication of the libel cannot be treated as a merely negligent act causing injury to other persons, inasmuch as the jury have found that the plaintiff was actuated by express malice. This consideration excludes the present case from the principle of such cases as *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (1) and many others

(1) [1898] 2 Q. B. 114.

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in which insured persons have been held entitled to recover although the loss in question arose from the negligence of the assured or his servants. Again it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty. But in such a case the right of action against the master and his legal liability themselves result from the servant's negligent act, and but for that act would not have existed. This is not so in the present case. I think the defendant's case may be rested on the broad ground that no "claim for indemnity can be maintained where the doer of the act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime": per Kennedy J. in *Burrows* v. *Rhodes*. (1) In that case the plaintiff was held to be entitled to recover loss and expenses to which he had been put in connection with the Jameson raid from persons by whose representations he had been induced to join in the raid in the belief that it was lawful. It was the fact of the plaintiff having this belief that in the opinion of the Court entitled him to relief, and but for it he would have had no cause of action. In my judgment then the damages awarded by the jury were not legally recoverable. No other special damage was alleged, and therefore the damages must be nominal.

The result is that, while on technical grounds the plaintiff was entitled to have judgment entered for him for nominal damages, and the judgment actually entered must be varied accordingly, in substance his action was rightly held to have failed. Under these circumstances the question arises, What ought to be done in reference to costs? The case was tried with a jury, and accordingly the costs must follow the event, unless the judge by whom it was tried or the Court shall for good cause otherwise order. The judge had not to consider the question because he gave judgment for the defendant and the costs followed. We however have to say first whether there is good cause for saying the costs shall not follow the event,

(1) [1899] 1 Q. B. 816, 833.

namely, the judgment for nominal damages, and secondly, if there is good cause, then what order should be made.

In my opinion, in an action founded on contract where, as in the present case, the plaintiff claims a large sum, and in the result, though he establishes his contract and proves the breach, recovers only nominal damages, there is good ground for a special order as to costs. If there is good cause then the Court has discretion as to the mode in which the costs shall be dealt with. See *Harris* v. *Petherick*. (1) And I think it ought to be exercised in the present case by depriving the plaintiff of his costs. I have doubted whether we ought not to go further and order him to pay the defendant's costs, but I have come to the conclusion that the negligent conduct of the defendant or of his partner has really brought about the action, and he cannot complain if he has to bear his own costs. The appeal involves an alteration of the judgment to some extent in the appellant's favour, but I think the proper course is to give no costs.

I agree that the cross-appeal fails and must be dismissed without costs.

SCRUTTON L.J. Mr. Weld-Blundell is an elderly gentleman who has never appreciated that "the tongue is an unruly member," and has not been taught by verdicts in libel actions to restrain his tongue. He is also engaged in a number of not very successful speculations, and on May 4, 1915, he instructed an accountant, one Stephens, who had acted for him before and was therefore acquainted with his peculiarities, to investigate the affairs of a company managed by one Hirst, which affairs he suspected were not in order. In the course of his letter, he said that Hirst's predecessor "Lowe, an ingenious thief, with the help of the rest of the gang, B., H. A., and C. managed by just the same manœuvres and pretexts to get two or three thousands." Stephens accepted the employment for reward, and sent his partner to call on Hirst to make inquiries about the company. The partner, by what appears to me quite inexcusable carelessness, dropped or left

(1) (1879) 4 Q. B. D. 611.

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the letter in Hirst's room. Hirst conceived himself to be justified in reading a private letter obviously not meant for him, and passed it on to Lowe and Comins, who immediately brought actions against Mr. Weld-Blundell for libel, the publication alleged being the publication to Stephens. Mr. Weld-Blundell not unnaturally wrote an indignant letter to Stephens. One would rather have expected a man through whose partner's carelessness such a result had happened to overlook the indignation, and undertake responsibility for the actions which his carelessness had brought about. But Mr. Stephens took advantage of the terms of Mr. Weld-Blundell's letter to refuse to take any responsibility. Mr. Weld-Blundell in consequence felt himself unable to settle the actions on terms offered and went to trial. The judge found the occasion of publication to Stephens privileged, but the jury found it was malicious, and assessed heavy damages, which were reduced by the Court of Appeal. In all Mr. Weld-Blundell had to pay some 1600*l*. He then sued Stephens to recover this sum, as damages for Stephens' breach of his contract to use reasonable care to keep his employer's documents and business secret. The jury found that the employment was such that there was an obligation to keep its subject matter secret, and assessed damages 650*l*. The judge, on the application of the defendant, entered judgment for him on the ground that the plaintiff's loss followed from his own wrongful act in writing a libel. Mr. Weld-Blundell now appeals and asks for judgment according to the findings of the jury. The defendant cross-appeals for a new trial on the ground of excessive damages, verdict against the weight of evidence, and misdirections.

In giving judgment for the defendant, Darling J. after reviewing the authorities, which he holds, I think rightly, do not directly decide the point argued before him, comes to the conclusion that the law "does not, and cannot, imply any such promise or term as that which the plaintiff alleges." The plaintiff's allegation was that there was an obligation on Stephens to use reasonable care to keep secret his client's documents and business, though the documents were libels, and their communication to him a tort. The defendant's

contention, the learned judge expresses in two ways: "The injury sustained by the defendant"—which must mean the plaintiff, Weld-Blundell, as defendant in the action for libel—"is traceable to his own unlawful act, and the maxim ex turpi causa non oritur actio is said to apply"; and again: "Can one recover damages against another because he has had to make reparation for a wrongful act committed by himself? I think he cannot."

I do not think it necessary in this case to consider whether a plaintiff who has committed an act punishable criminally can ever recover damages based on his liability for that criminal act; though I reserve liberty to consider whether the decision of Rowlatt J. in *Leslie* v. *Reliable, &c., Agency* (1) is correct. I do not at present see that an agreement to take precautions to prevent a man committing a crime is in any way contrary to public policy, and if that agreement is broken, and its breach causes the principal to commit a crime without any mens rea, the crime in that case being the sending of a money-lender's circular to a minor, it is very arguable that damages are recoverable. Kennedy J. in his judgment in *Burrows* v. *Rhodes* (2), one of the many careful and instructive judgments with which he enriched our law, in dealing with liability for criminal acts as a foundation for contribution or indemnity, was of opinion (1.) that where the doer of the act knew it to be a criminal offence, he could not recover damages based on his liability for the crime; and he included in this a case where the actor knew all the material facts, but did not know they constituted a crime, for he was presumed to know the law; (2.) that where the actor, though not knowing all the facts that made the act a legal offence, knew it was morally wrong, he could not make his act the basis of a claim; (3.) that where the actor was induced to do the act by a fraudulent misrepresentation of its character which, if true, would have made the act legal, he could in an action of deceit recover damages for the liability imposed on him because he had done the act in question. This was the case in *Burrows* v. *Rhodes* (3)

(1) [1915] 1 K. B. 652.

(2) [1899] 1 Q. B. 816, 827.

(3) Ibid. 816.

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where the action was allowed. In *Colburn* v. *Patmore* (1) Patmore was engaged to edit the Court Journal, and he published in it a libel, for which Colburn, the proprietor, was convicted on criminal information. Colburn then sued Patmore for negligence in editing. The action failed on what seems to us now the absurd pleading point that it was not clearly alleged that the publication for which Colburn was fined was the same publication which constituted Patmore's negligence. But the point was taken that the plaintiff could not claim compensation based on the commission of a public wrong, i.e., crime. The Court avoided deciding it by the pleading point referred to, but they, with the exception of Bolland B., were obviously of opinion that "a person declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission," and this, though the person punished was in fact ignorant of the criminal act, and was punished because he had acted by his servant. It is not clear that it is contrary to public policy to employ a servant to take precautions that you are not made criminally liable by acts of your servants, or why the servant should not be liable, if through his negligence you are made liable, not being knowingly party to the criminal act.

But in this case Mr. Weld-Blundell has not been convicted of criminal libel, nor do I think he could have been. As pointed out in *Reg.* v. *Labouchere* (2) the criminality of libels depends on their tendency to disturb the King's peace, a quality illustrated by the libel held to be the proper subject of criminal proceedings in *Reg.* v. *Adams*. (3) This quality appears entirely lacking in a private communication libelling a third person, from Mr. Weld-Blundell to his accountant, to be kept private by the latter. The case must, therefore, be considered on the basis that the plaintiff is claiming damages based on his having committed a tort, and having had to pay damages in consequence, and the breach of contract that he complains of is not that the defendant has not taken precautions to prevent him from committing the tort, but that the

(1) 1 C. M. & R. 73.
(2) (1884) 12 Q. B. D. 320, 322.
(3) (1888) 22 Q. B. D. 66.

defendant by his breach of contract to keep the communications confidential, has provided or made public the evidence, written by the plaintiff, which proves the case against him, and enables it to be brought. When in *Colburn* v. *Patmore* (1) Lord Lyndhurst asked Mr. Maule arguing: "Suppose that Colburn, instead of having an information filed against him, had been sued in an action for damages," counsel answered: "The correct principle is this, that in all cases where the act done is a public wrong, a party connected with the commission of that act cannot claim either indemnity or compensation." This apparently refers to libels which can be proceeded against both civilly and criminally, not to libels which are not crimes. Many of the wide general statements on this subject in the books need careful limitation. Thus Lord Mansfield in *Holman* v. *Johnson* (2) says: "The principle of public policy is this: 'ex dolo malo non oritur actio.' No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted." But when the illegal act is a civil wrong, there are many cases where a plaintiff successfully founds his cause of action on an illegal act. An auctioneer sells property not belonging to him on the instructions of an apparent owner, not the true owner. The auctioneer is liable for the tort of conversion, but he can recover the damages he has to pay against his principal: *Adamson* v. *Jarvis*. (3) Best C. J. says in that case that the doctrine of *Merryweather* v. *Nixan* (4), that there is no contribution between joint tortfeasors, is confined to the cases where the person seeking contribution is presumed to have known he was doing an unlawful act, and this view is approved by Lord Herschell L.C. in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (5) Best C.J. pointed out the public danger of the contrary doctrine as applied to auctioneers, brokers, factors and agents.

(1) 1 C. M. & R. 73, 82.
(2) 1 Cowp. 341, 343.
(3) (1827) 4 Bing. 66, 73.
(4) (1799) 8 T. R. 186.
(5) [1894] A. C. 318, 324.

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In *Betts* v. *Gibbins* (1), where all the cases up to that time are discussed, the distinction is made between acts obviously unlawful like breaches of the peace, or cases in which the conduct of the parties is in contravention of public policy, on the one hand, where no contribution or indemnity can be obtained; and on the other, cases where the act is not clearly illegal in itself; where the matter is indifferent in itself and it turns on circumstances whether the act be wrong or not; acts so far doubtful that they could not be notoriously illegal; in which cases indemnity or contribution could be recovered. The action for maintenance may be brought by a plaintiff who alleges that he has committed a tort for which he has had to pay damages, and that the defendant has maintained without lawful excuse the person who recovered damages against him, the maintenance causing him special damage. See *Oram* v. *Hutt* (2), and the decision of the majority of the House of Lords in *Neville* v. *London Express Newspaper*. (3) The majority—three members of the Court, Lord Finlay L.C., Lord Haldane and Lord Atkinson—are of opinion that an action will lie for maintenance, though the maintained action succeeds, though the Lord Chancellor is of opinion that special damage must be proved by the plaintiff if he is to maintain an action. He said: "It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligation or that he has incurred expenses in attempting to evade them." The Lord Chancellor had just explained that the plaintiff had been held guilty of fraud. He cannot have intended to overrule the numerous cases not cited to or referred to by the House of Lords, such as *Hammond & Co.* v. *Bussey* (4) and *Agius* v. *Great Western Colliery Co.* (5) where an unsuccessful defendant has been allowed to recover as damages for breach of contract both the sum awarded against him in an action resulting from that breach of contract, and the costs of his unsuccessful defence, if the defence were reasonably set up.

(1) (1834) 2 Ad. & E. 57.
(2) [1914] 1 Ch. 98, 107.
(3) [1919] A. C. 368. The learned Lord Justice's quotations are from the official transcript of the judgments.
(4) (1887) 20 Q. B. D. 79.
(5) [1899] 1 Q. B. 413.

Lord Atkinson takes the view that the damages for maintenance "do not necessarily include" the amount of the judgment and costs in the maintained action, for the liability was not created by the wrongful act of maintenance. I should have thought the effective enforcement of the liability so as to result in loss to the defendant was or might be the result of the maintenance, if but for the maintenance the claimant would not have proceeded with the maintained action. Lord Haldane says: "It appears to me that a debt which a debtor is forced by litigation to pay cannot properly be called damages either in the maintained action or the action for maintenance, neither can the costs incurred by him in defending himself unsuccessfully against a charge of fraud." This again cannot have been intended to disturb such cases as *Adamson* v. *Jarvis* (1), *Betts* v. *Gibbins* (2), or the *Hammond & Co.* v. *Bussey* (3) class of cases, in all of which a man recovers damages he has been legally bound to pay and the costs of his unsuccessful but reasonable defence. When Lord Haldane speaks of "costs to which he was justly condemned for resisting a proper legal claim," since "the real cause of the expenditure was his own improper resistance," I venture to think that if the noble Lord had been reminded of the cases to which I have referred, he would have so worded his judgment as to distinguish them. The distinction is, I think, that which this Court has to try to express in this judgment. The view of Lord Haldane and Lord Atkinson differing from that of the Lord Chancellor, is that the plaintiff could at any rate recover nominal damages though he failed in the maintained action; Lord Haldane indeed thinks the jury might give "exemplary damages." The minority, Lord Shaw and Lord Phillimore, take the view that the wrong of maintenance is only in maintaining an unjust action; that no civil action of maintenance can be brought where the maintained action succeeds.

It has also been decided that one partner may recover contribution against another for the damages recoverable because

(1) 4 Bing. 66. (2) 2 Ad. & E. 57.
(3) 20 Q. B. D. 79.

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of a tort committed by their joint servant, as in driving negligently: *Pearson* v. *Skelton*. (1) Indeed, most of the actions on motor insurances policies, or on collision clauses in marine insurance, are based on the commission of a tort by the servants of the assured, or in the case of motors by the assured himself. In marine insurance the judgments of the Court of Appeal in *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (2) show that only where the loss, which may, as in collision cases, be damages paid for a tort, is caused by the wilful act or default of the owner, will there be a defence, and that negligent navigation by the owner leading to a collision does not defeat his claim to recover the damages he has had to pay owing to his tort. So in fire policies, the assured can recover for a fire caused by his negligence; but not for a fire caused by his wilful act, or that of someone acting with his privity and consent: per Watkin Williams J., *Midland Insurance Co.* v. *Smith*. (3) It seems therefore that not every civil wrong prevents the person committing it from basing a cause of action and claim for damages paid in consequence of liability for that wrong on some contract relating to or involving consideration of that wrong, but only those civil wrongs which the actor knows to be wrong, and as to which he can allege no public policy to justify his basing an action on a contract connected with such a wrongful act. Kennedy J. thus expresses it in *Burrows* v. *Rhodes* (4): "Where the doer of the act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime." Take the case of legal proceedings. I do not refer to counsel, for they have no contract of employment in law, though I have always understood that counsel defending a murderer who confessed to them his guilt are bound to continue his defence so long as they express no personal opinion on his innocence, and are certainly not entitled to reveal the confession to the prosecution. But take the case of a solicitor. Under the decision in *Reg.* v. *Cox and Railton* (5) when the accused has consulted

(1) (1836) 1 M. & W. 504.
(2) [1898] 2 Q. B. 114, 124, 127.
(3) (1881) 6 Q. B. D. 561, 568.
(4) [1899] 1 Q. B. 816, 833.
(5) 14 Q. B. D. 153, 175.

his solicitor after the commission of a crime for the legitimate purpose of being defended the communication is privileged, the privilege being that of the client. If then the solicitor in breach of this confidence and privilege announced his intention of informing the prosecution of the contents of his client's communication, I cannot believe that the Court would not restrain him before communication or give damages against him for breach of his contract of employment after communication, even though those damages were based on his having provided evidence to prove the client guilty of a crime he had in fact committed. The reason would be that the public policy that crime should be punished would be outweighed by the public policy that accused persons should be properly defended, and contracts necessary for their defence observed. There is a public policy in not lightly interfering with freedom of contract: per Jessel M.R. in *Printing and Numerical Registering Co.* v. *Sampson.* (1)

I have been referred to an unreported case in which the Courts appear to have taken this view. M. and P., rival traders, entered into a secret agreement by which P. bought up M. though it was provided that they should continue to trade as apparently competing firms. T. acting as M.'s solicitor acquired knowledge of this, and subsequently for motives of his own proposed to make it public, first directly, and subsequently by the indirect means hereinafter stated. M. brought an action in the Chancery Division on August 26, 1885 (2), to restrain him from divulging information acquired as solicitor to M., and moved for an interim injunction which was granted by A. L. Smith J. (3) and affirmed by the Court of Appeal on November 18, 1885, after a preliminary decision to hear the case in camera, which is reported: *Mellor* v. *Thompson.* (4) As appears by the affidavits (5) and statement of defence (March 9, 1886), T. claimed a right as an elector of Worcester to object to M. as a parliamentary voter, and to use in evidence the agreement, and also to use it to expose a fraud on the

(1) (1875) L. R. 19 Eq. 462, 465.
(2) (1885) M. 3184.
(3) Written Orders 1885, Nos. 1243, 1285, 1582.
(4) (1885) 31 Ch. D. 55.
(5) (1885) M. 3722, s. 13; M. 3755, ss. 14-24.

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Income Tax Commissioners. The Court of Appeal granted the injunction in spite of this claim, and when the cause came on for trial before Chitty J. on June 28 and 29, 1887, he also granted the injunction restraining the defendant from making public this information "so as to injure the plaintiff or at all." Here the Court restrained the defendant from acting in pursuance of a claim of public duty, and, if he had made public the information he received as solicitor and injured the plaintiff, would apparently have given damages against him, though the damages were based on a breach of some public duty. In *Saunders* v. *Seyd and Kelly's Credit Index Co.* (1) the claimant failed because he was suing on a contract to which the respondent was not a party, but both Stirling J. and Lindley L.J. appear to assume that a contract not to disclose the possibly libellous contents of a trade register would be binding on the purchaser of the book who entered into such a contract, and I think that that purchaser had very good legal ground to complain of the conduct of his solicitor who disclosed the book he had received as solicitor from his clients to strangers.

On these principles the questions in this case appear to be: (1.) Was Mr. Weld-Blundell's act, in sending the libellous letter of instructions to his accountant, an action which he knew or must be presumed to have known to be wrong? If not written with express malice as defined by the authorities, which include gross and unreasoning prejudice (see *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2)), the occasion would be privileged, and the act lawful. Whether a jury would find express malice and destroy the privilege, is hardly a matter of certainty. People suffering from gross prejudice do not always know it though perhaps they ought to. Still Mr. Weld-Blundell was not, in the words of Patteson J. in *Betts* v. *Gibbins* (3), plainly a wrongdoer; the allegation that he was "was a claim which might possibly be resisted." See also per Lord Denman C.J. (4) It seems to me the quality of the act for this purpose must depend not on the ultimate

(1) 75 L. T. 193.
(2) [1892] 1 Q. B. 431, 443, 444.
(3) 2 Ad. & E. 57, 76, 77.
(4) Ibid. 74.

result, but on the appearances at the time. (2.) Even if Mr. Weld-Blundell must be taken to have known that he was doing wrong in sending a letter which the jury have found to be malicious on an occasion otherwise privileged, is there anything contrary to public policy in an agreement with the recipient to take reasonable care not to disclose such a letter? Or, to put it in another form, is it in accordance with public policy to enforce such an agreement? The law looks favourably on attempts to discover and prevent crimes. It frees a person from liability if he prosecutes an innocent man, provided he does so with reasonable and probable cause and without malice. It cannot be contrary to public policy to make full inquiries through competent agents, such as detectives and accountants, before prosecuting; inquiries which may easily involve communication by the parties to the inquiry, each to the other, of statements prima facie libellous about third persons. In view of the fact that to disclose a prima facie libellous statement to others may easily involve a risk of actions, and a risk of the jury's finding of malice destroying privilege, I can see nothing contrary to public policy in an agreement to use reasonable care not to disclose such statements to others. Judges and counsel are given absolute privilege in legal proceedings, because of the difficulty in doing their work, if they were to be exposed to actions inviting the jury to find that they acted maliciously and so lost their privilege. I can see nothing contrary to public policy in agreements between employers and employed to afford no opportunity for such actions. The duty of a solicitor employed in defence of a client to keep secret his client's communications, though evidence of that client's crimes, unless compelled to disclose them by legal authority, is a clear case of such a valid agreement. I think an agreement by a detective, private inquiry agent, or accountant to use reasonable care to keep secret the communications of his client as to the matter he is investigating is in accordance with public policy and should be enforced. *Gartside* v. *Outram* (1) does not seem to me inconsistent with this. The clients there had committed frauds, which their

(1) 26 L. J. (Ch.) 113.

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confidential clerk had known as such confidential clerk. The Court refused to restrain him from disclosing them. The acts were fraudulent, and clearly criminal, and there was no public policy, such as the importance of defence by solicitors, to enforce the agreement; the frauds were not committed in pursuit of any aim supposed to be of public advantage. The Court declined to exercise its equitable jurisdiction and left the claimant to his remedy at law.

I come back to the question on which I have felt considerable difficulty, whether the benefit of the agreement, which I am clear exists, to take reasonable care not to disclose prima facie defamatory communications within the privilege, is lost if in the opinion of the jury the writer has exceeded the bounds of privilege and become malicious. I have had great doubt about this matter, as I can see the force of an argument that a man who is found to have been malicious must be taken to have known that he was malicious and therefore doing an act morally wrong, but with some hesitation I have come to the conclusion that, in view of the doubtfulness of the question whether a jury will find malice, I cannot say that Mr. Weld-Blundell must be taken to have known that he was committing an unlawful act, so as to lose all protection if the letter were revealed. But if I am wrong in this, I think that the public policy of enforcing all agreements, especially agreements such as this, overrides the public policy as to criminal acts. As in my view the solicitor employed to defend a criminal could be sued for disclosing his client's confession of a crime, and damages recovered against him, so in this case an accountant employed confidentially to investigate a supposed crime could be sued for damages if he carelessly disclosed libellous letters written in supposed carrying out of that purpose, though a jury ultimately found them malicious. It will be noticed that this is not a case where the defendant alleges he felt bound as a good citizen to disclose the libel, but one where, after accepting employment to investigate the matter of the libel, he carelessly left the libel about, so that it was discovered. It appears to me rather a mockery of important principles of justice to invoke their aid in such a case. For these reasons

I am of opinion that Darling J. was wrong in entering judgment for the defendant.

My brothers and I agree in thinking that an agreement by the investigating accountant not to disclose the employer's letters, though one was prima facie libellous, was not illegal or contrary to public policy. We appear to agree that if it were known that the accountant proposed to disclose these letters the Court would restrain him by injunction. I take the view that a legal agreement not contrary to public policy, which the Court would enforce by injunction before it was broken, also gives rise to an action for damages if it is broken, though the damages take the form of damages suffered in an action of tort for which the disclosure has provided evidence, but which could not have been brought without the disclosure. I should take the same view in the case of an action against the solicitor for damages for disclosing his client's admission of a civil wrong, and I think also of a crime. The reason is that it is public policy that such agreements should be made, and should be effective by being enforced, and that if no consequences follow from their breach they will not be effectively enforced. My brothers, while thinking the agreement legal and one they could enforce before breach, will not enforce it after breach by giving the damages caused by its breach, and to prevent which it was made. We must agree to differ on this point.

The defendants gave notice of cross-appeal on the ground that the verdict was against the weight of evidence, that there was misdirection, and that the damages were excessive. The verdict that it was an implied term of the employment that the letter should be kept secret was one well within the power of the jury to find; I think I should have found the same verdict. There was no substance in any of the misdirections complained of. The allegation that the damages were excessive was founded on evidence that Mr. Weld-Blundell could have settled the actions for a smaller sum. But Mr. Stephens had refused to accept any liability for the settlement, and the jury may well have thought that it was not unreasonable for Mr. Weld-Blundell in view of that attitude to proceed to trial, but that his own behaviour in relation to the trial was

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responsible for a good deal of the damages and costs. I think Mr. Stephens has got off very lightly for what seems to me to have been gross carelessness on the part of his partner, and I see no ground for his cross-appeal.

Appeal allowed. Cross-appeal dismissed.

Solicitors for appellant: *Blanckensee & Co.*
Solicitors for respondent: *Spyer & Sons.*

W. H. G.

[COURT OF CRIMINAL APPEAL.]

1919 *Feb.* 3.

THE KING *v.* EDGAR WENTWORTH SANDERS.

Criminal Law—Obtaining Money by false Pretences—Sale—Warranty—Untrue Statements—Knowledge—Evidence—Admissibility—Time for taking Objection.

The appellant, a horse dealer, sold to the prosecutor two mares for 70*l.*, which sum the prosecutor paid to the appellant. The mares were warranted by the appellant to be, respectively, seven and eight years old, to be in foal, and sound. It was agreed that if the mares were not as warranted the prosecutor should have the right to return them within fourteen days. The mares were, to the knowledge of the appellant, not as warranted in any respect. The prosecutor, having failed to obtain repayment of the 70*l.*, did not return the mares. The appellant was charged, on an indictment, with having obtained the 70*l.* by false pretences, and convicted:—

Held, that the conviction was right.

Rex v. *Pywell* (1816) 1 Stark. 402 explained.

The Court of Criminal Appeal will not entertain an objection to the admissibility of evidence, if the objection was not taken at the trial when the evidence was tendered, although it was taken during the opening speech of counsel for the prosecution.

APPEAL against conviction.

The appellant was tried at the Dorsetshire Quarter Sessions on an indictment which alleged that he had obtained 70*l.* from one Harding by falsely pretending that he had two mares in foal to sell, one eight and the other seven years old, and sound in wind and limb. Harding was a farmer in Dorsetshire.

Having seen an advertisement by the appellant in a newspaper stating that the appellant had two heavy shire mares in foal for sale, he wrote to the appellant, who carried on business as a job master and horse dealer at Camberwell, asking for particulars of the mares. The appellant wrote in reply on April 16, 1918, as follows :—" In reply to your letter re the two mares which are in foal, the mares are seven and eight years old, 16 and 16½ hands high, both sound in the wind and not lame. One is due to foal the 18th of May, the other the 20th May. . . . . These mares cost me 90 guineas each when I purchased them. I will accept 90 guineas the two. . . . . I will warrant them as I have described them in this letter." Harding's wife, who conducted his correspondence, wrote by his instructions to the appellant :—" Your letter to hand re mares in foal, I would give 60 guineas for same. If my offer is accepted, and the mares prove to be as your letter warrants for 14 days to be detained by me, if not as warranted in 14 days to be returned." After some further correspondence Harding offered 70*l.* for the mares, which the appellant accepted. On May 1 Harding sent to the appellant a cheque for 70*l.* which the appellant cashed, and on May 4 the mares were sent by train to Dorchester and received there by Harding.

Harding gave evidence to the effect that immediately on receiving the mares he saw that they were not as warranted, and that his wife wrote on May 7 and May 26 to the appellant to that effect, and asking for the return of the 70*l.* No reply was received to either of those letters, and, therefore, he did not return the mares. He subsequently put the matter in the hands of his solicitor who wrote to the appellant on October 1, and no reply was received to that letter. Evidence was given for the prosecution by a veterinary surgeon who examined the mares on August 5. He stated that the mares were about 17 years old ; neither was sound ; and neither was in foal or showed any sign of having been in foal at the end of April ; these facts must have been obvious to any one accustomed to deal in horses. No evidence was given by or on behalf of the appellant.

During the opening speech of counsel for the prosecution,

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he proposed to read copies of the letters written by Harding's wife and by his solicitor to the appellant. Counsel for the appellant objected that copies of the letters could not be read, as no notice to produce the original letters had been given to the appellant. The chairman upheld the objection and the copies were not then read. In the course of Harding's evidence he was questioned by counsel for the prosecution as to the letters, and no objection was then taken by counsel for the appellant to the questions or to Harding's answers.

The chairman directed the jury that in order to convict the appellant they must be absolutely convinced that the appellant knew that the statements in his letter of April 16 were false.

The appellant was convicted and sentenced to 12 months' imprisonment with hard labour.

Sir Ernest Wild K.C. and *Wickham* for the appellant. The copies of the letters alleged to have been written by the prosecutor's wife and solicitor demanding the return of the money were wrongly admitted in evidence, and apart from these copies of letters there was no evidence that the prosecutor had ever brought to the knowledge of the appellant the fact that the prosecutor was alleging a breach of warranty.

The contract of sale was subject to a condition that if the mares were not as warranted they were to be returned within fourteen days. Until that period had elapsed no property in the money passed to the appellant, and, therefore, the receipt by him of the money on May 1 could not constitute the offence of obtaining money by false pretences.

[Avory J. referred to *Rex* v. *Crossley*. (1)]

Secondly, "an indictment will not lie for a deceitful representation and warranty of the soundness of an horse": *Rex* v. *Pywell*. (2) It is a mere breach of a civil contract, not an indictable offence: *Rex* v. *Wheatly* (3), *Reg.* v. *Keighley*. (4)

Lastly, there was not sufficient evidence to justify a finding that the appellant knew that the statements in his letter were untrue.

(1) (1837) 2 Moo. & R. 17.
(2) 1 Stark. 402.
(3) (1761) 2 Burr. 1125.
(4) (1856) 1 D. & B. 145; 7 Cox, C. C. 217.

Glen for the Crown was not called upon.

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The judgment of the Court (Bray, Avory and Sankey JJ.) was delivered by

BRAY J., who, after stating the facts, said :—In this case several objections to the conviction have been taken on behalf of the appellant. First, it is said that evidence as to the contents of the letters written to the appellant by the wife and by the solicitor of the prosecutor, stating that the mares were not as warranted and demanding the return of the money paid for them was not admissible, as no notice to produce the original letters had been given to the appellant. It appears that counsel for the prosecution in the course of his opening speech was about to read these copies. Counsel for the defence objected, and the chairman ruled that they were inadmissible. But when the prosecutor was giving evidence he was asked about the letters that had been written and no objection to the admission of the evidence was then raised. In our opinion if it was intended to rely on this point the objection should have been repeated at the time when the evidence was tendered, and not having been taken then, it cannot now be taken in this court at all events when the prisoner was represented by counsel.

But, if the letters are disregarded, and assuming that there was no evidence of any attempt by the prosecutor to return the mares to the appellant, that affords no answer to the charge of obtaining the money by false pretences. It is contended that because the mares were not returned the indictment will not lie. I will assume that the prosecutor could not have recovered the money in a civil action if he had not returned the mares, but in a criminal charge it is immaterial whether he has returned them or not. It is said that the property in the money had not passed to the appellant, but it is quite clear that in order to sustain an indictment for obtaining money by false pretences it is not necessary to prove that the property in the money has passed. In *Reg.* v. *Burgon* (1) it was held

(1) (1856) 1 D. & B. 11; 25 L. J. (M. C.) 105.

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that where an advance of money by way of loan was obtained by a false pretence, an indictment for obtaining the money by a false pretence would lie. The next point that was taken was that an indictment for false pretences will not lie where a horse has been sold with a warranty. That question was long ago decided adversely to the contention of the appellant. It is only necessary to refer to *Reg.* v. *Kenrick* (1), where it was held that a false pretence, knowingly made, to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make. In that case the two defendants had conspired to make a representation, knowing it to be false, that certain horses were the property of a private person, and not of a horse dealer, thereby inducing the prosecutor to buy the horses, and it was held that proof of those facts was sufficient to sustain an indictment for obtaining money by false pretences.

Rex v. *Pywell* (2) was relied on for the appellant, but when that case is examined it will be seen that the headnote does not correctly represent the decision of the Court. The indictment was for a conspiracy to cheat and defraud the prosecutor by selling him an unsound horse, which had been warranted as sound. Lord Ellenborough said that "the case did not assume the shape of a conspiracy; the evidence would not warrant any proceeding beyond that of an action on the warranty, for the breach of a civil contract. . . . . No indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud." That case is, therefore, no authority for the proposition contended for; it merely illustrates the principle that where there is a charge of conspiracy, there must be some evidence that the parties charged were acting in concert.

The last point taken was that there was no sufficient evidence that the appellant knew that his statements as to the ages and condition of the mares were untrue. The chairman pointed out to the jury that before they could find the appellant guilty they must be absolutely convinced that he knew that his statements were untrue. The jury must have found their

(1) (1843) 5 Q. B. 49. (2) 1 Stark, 402, 403.

verdict on the footing that he did know that the statements were untrue, and there was in our opinion ample evidence to justify the verdict. The appeal therefore fails on all grounds and must be dismissed.

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Appeal dismissed.

Solicitor for appellant: *H. Percy Crowe.*
Solicitor for the Crown: *Director of Public Prosecutions.*

F. O. R.

MILLS *v.* BROOKER.

1919
Feb. 17.

Adjoining Owners—Branches of Fruit Trees overhanging Neighbour's Land—Right of Neighbour to pick the Fruit.

Where the branches of fruit trees growing near their owner's boundary overhang the land of the adjoining owner, the right of the adjoining owner to lop the branches does not carry with it the right to pick and appropriate the fruit, and if he does so he is guilty of conversion and liable to the owner for its value.

APPEAL from the Maidstone County Court.

The plaintiff and defendant were neighbours. The plaintiff was the owner of ten Bramley's Seedling apple trees growing on his land eight feet from the boundary. The branches of these trees overhung the defendant's land. The defendant picked apples off the overhanging branches to the amount of several bushels, and sold them. He claimed the right to do so on the ground that he had a right to lop the overhanging branches on which the apples grew. The plaintiff sued for damages for conversion. The county court judge held that though a man may remove a nuisance, he cannot appropriate the materials which cause the nuisance and convert them to his own use. He accordingly gave judgment for the plaintiff for 10*l.*, the value of the apples. The defendant appealed.

Maddocks for the defendant. Even if the apples in question were the property of the plaintiff he has no legal remedy

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for the defendant's act. He could not sue in trover for the same reason that he could not have charged the defendant with larceny if the act had not been done under a claim of right—namely, that the severance of the fruit from the freehold and the carrying of it away and converting it was all one continuous act, so that it did not involve any trespass to chattels as such. "Inasmuch as trespass to goods involves a taking from another's possession it cannot be committed by severing and carrying away part of the soil or a fixture or growing crop; for such things are not movable or in possession till they are severed; and the taking cannot be a wrong to possession which did not exist. Nor is it a wrong to a right to possession, for such a right cannot exist until the thing is in a state in which possession may be exercised over it, and in this case no such state precedes the taking": Pollock and Wright on Possession, p. 230. Nor could the plaintiff have sued for trespass to the realty, for the defendant had a right to lop the overhanging branches, and also to cut off the apples as being part of those branches. It is true that the defendant did not confine himself to severing the apples, he also appropriated them. But even if that was wrongful the plaintiff is in any case not entitled to recover their full value; for if the defendant having picked the apples had left them lying on the ground to rot the plaintiff could not have complained. He could not have sued in detinue in the absence of a claim by the defendant to a right of property in them; nor could he have entered the defendant's land and removed them, for that would have been a trespass. The county court judge referred to a dictum by Doderidge J. in *Mitten* v. *Faudrye* (1) to the effect that "If a tree grow in an hedge, and the fruit fall into another man's land, the owner may fetch it in the other man's land." But no authority is cited for that dictum, and it is not good law. It would be strange if the owner of a tree, by allowing it to overhang his neighbour's land, and thereby permitting a nuisance, could give himself a right to trespass on his neighbour's soil for the purpose of recovering the fruit that dropped from it.

(1) (1625) Poph. 161.

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If then he could not recover the apples themselves but was obliged to leave them where they could be of no possible use to him, he at the most ought to be entitled only to nominal damages.

Fletcher for the plaintiff. The law gives to an adjoining owner a strictly limited right to lop overhanging branches for the purpose of abating the nuisance; and it is clear that a person who picks the fruit from overhanging branches without cutting off the branches themselves does not do so with any object of abating the nuisance. Even if it be assumed that the defendant is within his rights if he merely picks off the apples without appropriating them, it is otherwise if he converts them to his own use. In Halsbury's Laws of England, Vol. I., par. 1077, it is said that in the case of "fruit dropped on a neighbour's garden . . . . so long as the involuntary depositary does no overt act to the chattel thus deposited on his land, he incurs no responsibility to the true owner in respect thereof. But if he . . . . uses it for his own purposes such user amounts to a conversion," by analogy to the case of a finder of a lost chattel: *Mulgrave* v. *Ogden*. (1) And a person who severs fruit from the tree in the exercise of a right of abatement cannot be in a better position.

Maddocks in reply.

AVORY J. I think the county court judge was right. The defendant claimed a right to pick the apples in question, and based his claim on his right to lop the overhanging branches on which they grew. No doubt the defendant in lopping the overhanging branches would not be committing a trespass, nor would he be bound to give notice to the plaintiff: *Lemmon* v. *Webb*. (2) But that right to lop rests upon the fact that the overhanging branches constitute a nuisance which he is entitled to abate. He is given the right for the purpose of abatement, and that alone. The right of lopping does not carry with it a right to appropriate the severed branches or the fruit growing on them. No doubt the apples while growing savoured of the realty, but it does not follow that they did not cease to

(1) (1591) Cro. Eliz. 219. (2) [1895] A. C. 1.

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do so upon severance. Mr. Maddocks relied upon a passage in Pollock and Wright on Possession, to the effect that the severance and carrying away of a growing crop cannot where it is one continuous act amount to larceny, as showing that neither can it amount to conversion. But that passage has no application to the subject of conversion. To constitute larceny there must be a taking of chattels out of the possession of the owner, and in the case put of the severing and carrying away of a growing crop the owner, ex hypothesi, never had possession of the crop as chattels. But for the purposes of conversion it is not necessary that there should be taking of the crop as chattels out of the possession of the owner; it is enough if he had a right to the possession of the crop after it assumed a chattel character, and that the plaintiff clearly had here. The apples were the plaintiff's property before severance, and they equally remained his property after they were severed, and he had a right to the possession of them. Whether there are any means by which he could have enforced that right, if the defendant had done nothing more than sever them, it is not necessary here to decide. But the defendant went on to appropriate them to his own use by selling them. That clearly amounted to a conversion. And in an action for that conversion the measure of the damages was, as the county court judge rightly held, the value of the apples. The appeal must be dismissed.

LUSH J. I agree. The owner of a fruit tree, the branches of which grow over the boundary of his land, is the owner of the fruit of the overhanging branches while it is still growing on the tree. It is equally his property after it has been detached from the tree, whether it has fallen from being ripe, or been blown off by the wind, or been severed by the act of man. The adjoining owner is entitled to sever the overhanging fruit in the exercise of a right of abatement of the nuisance, but the exercise of that right cannot divest the owner's right of property in the fruit so severed. It may be that the owner could not justify entering upon the adjoining land for the purpose of recovering the fruit, but as soon as

the adjoining owner carries off the fruit and sells it he is guilty of a conversion and liable in damages for the full value.

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Appeal dismissed.

Solicitors for the defendant: *Paterson, Candler & Sykes, for Ellis & Ellis, Maidstone.*

Solicitors for the plaintiff: *Bracher & Son, Maidstone.*

J. F. C.

RIPON RURAL DISTRICT COUNCIL *v.* ARMITAGE AND HODGSON.

1919 *Feb.* 26.

[1918 R. 30.]

Highway—Repair—Expenses of extraordinary Traffic—Claim for Less than 250l.—Jurisdiction of High Court—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*a*).

Sect. 12, sub-s. 1, of the Locomotives Act, 1898, provides: "Section twenty-three of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic), shall be amended as follows: (*a*) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the County Court, and if exceeding that sum in the High Court":—

Held, that an action cannot be brought in the High Court under this section, where the expenses sought to be recovered do not exceed 250*l.* *Chesterfield Rural Council* v. *Newton* [1904] 1 K. B. 62 distinguished.

POINT OF LAW raised on the pleadings.

The plaintiffs, who were the highway authority for their district, sued in the High Court to recover 182*l.* 18*s.* 4*d.*, the sum certified by their surveyor as the amount which, having regard to the average expense of repairing highways in the neighbourhood, had been incurred by the plaintiffs in repairing highways within their area which had been damaged by the defendants' extraordinary traffic.

Para. 1 of the amended statement of defence was as follows: "It will be objected that no action lies in the High Court

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in respect of the plaintiffs' claim for 182*l.* 18*s.* 4*d.* Sect. 12, sub-s. 1 (*a*), of the Locomotives Act, 1898, will be relied upon."

An order was made "that the point of law raised in para. 1 of the amended defence in this action be set down for trial as a preliminary point of law."

Macmorran K.C. and *A. M. Latter* for the defendants.

By s. 23 of the Highways and Locomotives (Amendment) Act, 1878, expenses of this nature were for the first time made recoverable, and the section specifically provided that they should be recoverable in a summary manner. That section was amended by s. 12, sub-s. 1 (*a*), of the Locomotives Act, 1898, and the two sections when read together, and properly construed, provide that where the expenses certified as having been incurred by the highway authority do not exceed 250*l.* they are recoverable only in the county court. Although the point we now contend for has been suggested in previous cases there is no direct authority upon it. In *Chertsey Urban Council* v. *Binns* (1) the point was expressly left open. In *Chesterfield Rural Council* v. *Newton* (2), where the point was suggested in argument, it was unnecessary to deal with it. In that case, although the amount actually recovered was less than 250*l.*, the sum claimed in the action was 732*l.*, and Collins M.R. said that the claim being on the face of it for an amount over 250*l.* the case was clearly one which the High Court had jurisdiction to entertain. In the absence of direct authority, the case must be considered in the light of the familiar doctrine that where a specific remedy is given by a statute, that alone can be pursued: *Pasmore* v. *Oswaldtwistle Urban Council.* (3) Applying that doctrine, the section, while providing a remedy by action, specifically prescribes the court in which the remedy is to be pursued, namely, in the county court if the amount does not exceed 250*l.* That means that where the action is for less than that amount it is maintainable only in the county court. *In re Willesden*

(1) (1905) 69 J. P. newspaper, p. 28.

(2) [1904] 1 K. B. 62.

(3) [1898] A. C. 387, 394.

Local Board and Wright (1) is an instance where this principle was applied in the case of expenses incurred under the Public Health Act. This action has, therefore, been wrongly brought in the High Court and should be dismissed.

[*In re Hanwell Urban Council and Smith* (2) was referred to.]

Disturnal K.C. and *Wrottesley* for the plaintiffs. Sect. 12, sub-s. 1 (*a*), of the Locomotives Act, 1898, when rightly construed, contains nothing which precludes the maintenance of this action in the High Court. It is to be observed that the section uses the word "may" and not "must." Where the Legislature has intended to provide that certain actions shall be maintainable only in the county court, it has done so in express words, as, for example, in s. 6, sub-s. 1, of the Employers Liability Act, 1880. Sect. 12 was not intended to draw a distinction between the High Court and the county court as to jurisdiction; it was merely intended to confer an additional jurisdiction upon the county court in respect of these expenses, that is, a jurisdiction more extensive than that which it possesses in ordinary actions. No exclusive jurisdiction is conferred upon the county court where the expenses sought to be recovered are less than 250*l*. If the contention for the defendants is right, *Chesterfield Rural Council* v. *Newton* (3) was wrongly decided. There only 60*l*. was recovered against the defendant in respect of expenses of extraordinary traffic, and it was nevertheless held that the action was properly brought in the High Court. In effect the Court of Appeal rejected the present contention that the word "may" in the section is to be read as meaning "must."

BRAY J. I think this case is reasonably clear. Before the passing of the Highways and Locomotives (Amendment) Act, 1878, expenses of the kind now claimed were not recoverable, and it is conceded that under s. 23 of that Act no action could have been brought either in the High Court or in the county court in respect of them. One remedy only was given by s. 23, namely, a right to recover the expenses in a summary

(1) [1896] 2 Q. B. 412. (2) (1904) 68 J. P. 496.
(3) [1904] 1 K.B. 62.

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manner. Difficulties arose in consequence of this because it often happened that very important cases had to be dealt with in a summary manner. The section was therefore amended by s. 12 of the Locomotives Act, 1898, the material words of which are these: "Expenses under [s. 23 of the Act of 1878] shall cease to be recoverable in a summary manner, but may be recovered if not exceeding two hundred and fifty pounds in the county court, and if exceeding that sum in the High Court." It is said on behalf of the plaintiffs that the defendants' contention involves reading the word "may" as "must." It is not necessary to do so. The section gives the highway authority a privilege or power to recover the expenses; they are not obliged to bring an action. Applying the familiar doctrine that if a specific remedy is given that alone may be pursued, it seems to me that the section is clear that expenses if not exceeding 250*l.* can be recovered only in the county court. To construe the words in a way that would allow a sum, however small, to be claimed in the High Court would be entirely contrary to the intention of the Act. Reliance was placed by the plaintiffs on the decision in *Chesterfield Rural Council* v. *Newton*. (1) In that case the expenses incurred by reason of extraordinary traffic were certified by the highway authority's surveyor at 732*l.*, and, accordingly, an action was brought in the High Court to recover that sum. As a matter of fact the jury found that damage had been caused to the amount of 120*l.* only, and it having been agreed that the defendant Newton was liable for one-half the amount of the damage, the finding of the jury amounted to a verdict against him for 60*l.* A question then arose whether the plaintiffs were entitled to High Court costs. The Master taxed the costs on the High Court scale, and his decision having been affirmed by the judge, the defendant appealed to the Court of Appeal. In his judgment Collins M.R. said (2): "It is further said that, though a sum of 732*l.* was claimed in the action, the result shows that the claim should have been for 120*l.*, and that sum being less than the 250*l.* mentioned in the section, the action ought to

(1) [1904] 1 K. B. 62. (2) Ibid. 65.

have been brought in the county court, and costs could only be recoverable on the county court scale. It seems to be clear that the action could have been brought in the county court; but it is equally clear that it was one which the High Court had jurisdiction to entertain, the claim being on the face of it for an amount over 250*l.*" So the Master of the Rolls laid it down that the action could be brought in the High Court because the claim was on the face of it for over 250*l.*, the action having to be decided upon a certificate as to the amount of the expenses incurred by the highway authority; but where a specific sum is claimed the High Court is not obliged to give judgment for that sum, but may give judgment for a less amount. It seems to me that *Chesterfield Rural Council* v. *Newton* (1) is not an authority governing the present case, nor is *Chertsey Urban Council* v. *Binns* (2), for there Lord Alverstone C.J. said that he would express no opinion upon this point. The action fails for the reason that, the amount claimed being less than 250*l.*, the High Court has no jurisdiction to entertain it.

Judgment for defendants.

Solicitors for plaintiffs: *Moodie & Sons, for Edmundson & Gowland, Ripon.*

Solicitors for defendants: *Peter Thomas & Clark, for Simpson & Curtis, Leeds.*

(1) [1904] 1 K. B. 62.

(2) 69 J. P. newspaper, p. 28.

J. S. H.

[COURT OF CRIMINAL APPEAL.]

1919
Feb. 24.

THE KING *v.* WILBERT GORDON ROY CREAMER.

Criminal Law—Receiving—Money taken by Wife from Husband—Evidence of Larceny by Wife—"Living together"—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 33, *sub-s.* 3, *s.* 36.

The appellant was indicted for receiving certain money well knowing it to have been stolen, and was convicted. The money had been taken by a married woman from her husband whose property it was :—

Held, that in the absence of evidence to show that the money had been taken by the wife in such circumstances as would support a prosecution and conviction of her for stealing the money, the conviction of the appellant for receiving could not be upheld.

A husband and wife do not cease to be "living together" within the meaning of s. 36 of the Larceny Act, 1916, merely because the husband is temporarily absent from the joint home on military service abroad.

APPEAL against conviction.

The appellant and Jane Tidey were tried at the Folkestone Quarter Sessions on an indictment which charged them with stealing in or about September, 1917, a cashbox, 170*l.* in banknotes, 500*l.* in Treasury notes, and 22*l.* 10*s.* in cash, the property of Arthur Tidey; and, in a second count, with receiving the said property well knowing it to have been stolen. Mary Tidey was the wife of Arthur Tidey. In 1916 she and her husband were living together at 44, Surrenden Road, Folkestone, where Tidey kept a garage and drove motor cars. On October 4, 1916, Tidey joined the Army, and shortly afterwards went to France. Before leaving he placed banknotes, Treasury notes and cash, of the amounts specified in the indictment, in a cashbox. He stated in evidence that this money had been saved by him in his business. The cashbox was locked and placed in a bag. The bag was locked and placed in a wooden box, which was locked, and which was left in Tidey's bedroom. Tidey retained possession of the three keys. Mrs. Tidey continued to live at 44, Surrenden Road. In October, 1916, after her husband had gone to France, she made the acquaintance of the appellant, who was a Canadian soldier stationed at Shorncliffe. In November, 1917, Tidey came home from France for a fortnight's leave. He found that the wooden box

had been broken open and that the bag and the cashbox were missing. Mrs. Tidey informed him that she had taken the money to her mother's, being frightened as to what might happen during an air raid. Tidey accepted this explanation as true, and made no inquiry of Mrs. Tidey's mother. Whilst he was at home on this occasion, he met the appellant, who was frequently at the house, but nothing occurred to arouse his suspicions as to the relations existing between his wife and the appellant. They had in fact become very intimate, and either in December, 1917, or January, 1918, immoral intercourse commenced between them. In May, 1918, Mrs. Tidey left 44, Surrenden Road, and went to Seaford, where she and the appellant lived together as man and wife until November, 1918, but Mrs. Tidey continued to correspond in affectionate terms with her husband in France. He returned to England on November 8, 1918, and found that his wife had left 44, Surrenden Road. In the wooden box he found the bag in which the cashbox had been placed. The lock of the bag had been forced, and the cashbox and the money were missing.

Mrs. Tidey admitted having taken the cashbox and the money, and she alleged in giving evidence at the trial that the money belonged to her and not to her husband. There was no evidence that any of the money had been taken later than November, 1917. There was evidence that the appellant had received some of the money. His defence was that he believed that the money belonged to Mrs. Tidey. Neither of the prisoners was represented by counsel at the trial.

The Recorder in his summing up told the jury in substance that they must consider whether it was proved that the money was the husband's property, and, if so, whether Mrs. Tidey had stolen it, and whether the appellant had received any of it with knowledge that it had been stolen. The Recorder did not call the attention of the jury to the provisions of s. 36 of the Larceny Act, 1916. (1)

(1) Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 33: "(1) Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the

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Mrs. Tidey was convicted of stealing. She did not appeal. The appellant was convicted of receiving.

Roome for the appellant. At common law a wife could not steal her husband's goods, and therefore it was held that her paramour who had received the goods which she had taken from her husband could not be guilty of receiving stolen goods : *Reg.* v. *Kenny*. (1) Under ss. 12 and 16 of the Married Women's Property Act, 1882, a married woman may be convicted of stealing her husband's goods if the husband and wife are not living together, or if the property was taken when the wife was " leaving or deserting, or about to leave or desert " her husband. But the Act of 1882 did not make it a statutory offence to receive property, knowing it to have been stolen by a wife, and it has been the practice in a case of that sort to indict the receiver for the common law misdemeanour of receiving. (2) Sects. 12 and 16 of the Act of 1882 are reproduced in s. 36 of the Larceny Act, 1916, and by s. 33, sub-s. 3, of that Act a person may be convicted of receiving whether the principal offender " is or is not amenable to justice." But where the alleged receiving is of goods alleged to have been stolen by a wife it is always necessary for the prosecution to prove affirmatively that the property of the husband was taken

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like degree (whether felony or misdemeanour). . . . .

" (3) Every such person may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice."

Sect. 36 : " A wife shall have the same remedies and redress under this Act for the protection and security of her own separate property as if such property belonged to her as a feme sole : Provided that no proceedings under this Act shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife.

" (2) A wife doing an act with respect to any property of her husband, which, if done by the husband in respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall be in like manner liable to criminal proceedings by her husband."

(1) (1877) 2 Q. B. D. 307.

(2) See *Reg.* v. *Streeter*, [1900] 2 Q. B. 601 ; *Rex* v. *Payne*, [1906] 1 K. B. 97.

by the wife in such circumstances as to constitute larceny. The onus was therefore on the prosecution to prove that at the time the money in this case was taken by the wife, that is, not later than November, 1917, the husband and wife were not living together. The evidence for the prosecution did not prove that, but proved the contrary. A husband and wife are none the less living together although they are temporarily residing in different places: *Chudley* v. *Chudley*. (1) Living together means living in a state of marital relationship. The consortium of husband and wife continues until one of the parties determines it: *Marshall* v. *Malcolm* (2); *Jones* v. *Davies* (3); *Drew* v. *Drew*. (4) Further, the prosecution failed to adduce any evidence that at the time the wife took the money she was leaving or deserting or about to leave or desert her husband. Even if the fact that she went to live with the appellant in May, 1918, can be said to be some evidence that she was about to leave her husband previously to November, 1917, the absence of any direction to the jury as to the law of larceny by a wife is a sufficient reason for quashing the conviction: *Rex* v. *King*. (5)

G. J. Talbot K.C. and *Weigall* for the Crown. The argument for the appellant misapprehends the scope of s. 36 of the Larceny Act, 1916. A married woman is capable of committing the crime of larceny, as defined by s. 1 of the Act, whether the goods taken belong to her husband or to a stranger. Sect. 36 does not affect the nature of the act of taking but merely provides that in the circumstances specified in the proviso there shall be no prosecution for the larceny. In *Rex* v. *James* (6) Lord Alverstone C.J. referring to the proviso to s. 12 of the Act of 1882, which is in the same terms as the proviso to s. 36, said: "The conditions imposed by that proviso do not affect the quality or character of the offence. They merely introduce matters which may be pleaded by way of defence," and therefore it was held in *Rex* v. *James* (6) that it was not necessary to negative those matters in the indictment.

(1) (1893) 17 Cox, C. C. 697.
(2) (1917) 87 L. J. (K. B.) 491.
(3) [1901] 1 K. B. 118.
(4) (1888) 13 P. D. 97.
(5) (1914) 10 Cr. App. R. 44.
(6) [1902] 1 K. B. 540, 546.

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Supposing a single woman stole the goods of a man whom she subsequently married, she would clearly have committed larceny, but if at the time of the prosecution she was living with her husband, the prosecution would fail. This example shows that s. 36 deals with procedure only. It follows that although the circumstances may be such that the wife cannot be prosecuted for larceny, the receiver of the stolen property can nevertheless be indicted and convicted. The wife in that case is "not amenable to justice" within the meaning of s. 33, sub-s. 3, of the Act of 1916.

[DARLING J. In Lush on Husband and Wife, 3rd ed., at p. 522 there is the following passage: "It is important to observe that the Act"—i.e., the Married Women's Property Act, 1882—"does not state that a husband cannot steal his wife's property, or a wife her husband's; only, that no 'proceedings shall be taken' in respect thereof. It is conceived, therefore, that a person could now be indicted for receiving from the wife property belonging to her husband which she had stolen, even while living with him."]

[LUSH J. referred to *Lemon* v. *Simmons*. (1)]

The guilt of the receiver cannot depend on the question whether the wife can or cannot be prosecuted. Secondly, the evidence in this case showed that the husband and wife were not living together when the property was taken. For the purpose of s. 36 it is not necessary to prove that the consortium of husband and wife has been finally determined. But in any event the passage cited above from *Rex* v. *James* (2) shows that the onus was on the defence to prove the facts necessary to bring the case within the proviso. The defendants failed to discharge that onus, and it was therefore unnecessary for the jury to be directed as to those matters, but in fact the law as to larceny by a wife of her husband's property was clearly stated to the jury by counsel for the prosecution.

The judgment of the Court (Darling, Avory, Lush, Shearman and Sankey JJ.) was delivered by

DARLING J. In this case the appellant has been convicted

(1) (1888) 57 L. J. (Q. B.) 260. (2) [1902] 1 K. B. 546.

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of receiving money which was alleged to have been stolen by a woman from her husband. There is no doubt that the woman took the money, which amounted to some hundreds of pounds and represented the husband's savings, and she shared it with the appellant, with whom she has committed adultery, so that it is clear there is nothing to be said in favour of the appellant on the merits or on moral grounds. The first question is whether it was proved that at the time the money was taken the husband and wife were not living together. For the prosecution it is said that they were living apart at the time. The money was taken not later than November, 1917. The evidence of the appellant was that immoral relations between him and the wife began either in December, 1917, or January, 1918. In determining whether a husband and wife are living together the law has regard to what is called the consortium of husband and wife, which is a kind of association only possible between husband and wife. A husband and wife are living together, not only when they are residing together in the same house, but also when they are living in different places, even if they are separated by the high seas, provided the consortium has not been determined. In this case it cannot be said that at the time the wife took the money the consortium had been determined, because the wife had not at that time committed adultery, and therefore it is little to the purpose to point to the fact that the wife was living at Folkestone and the husband was in France on service with the Army. In the legal sense they were still living together.

At common law a wife could not commit larceny of her husband's property, but by ss. 12 and 16 of the Married Women's Property Act, 1882, it was for the first time made possible to prosecute a wife for stealing her husband's goods. Those sections have been reproduced in s. 36 of the Larceny Act, 1916, which provides that no proceedings under the Act shall be taken by a husband against his wife while they are living together, nor while they are living apart as to any act done by the wife while they were living together, unless the property has been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband. It has

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been contended by Mr. Talbot that the effect of this legislation is to get rid of the common law disability of a married woman to commit larceny of her husand's goods, and to provide that henceforth a wife may be guilty of that offence, but that she can only be prosecuted provided that they are not living together at the time of the proceedings and were not at the time the goods were taken, unless they were taken when the wife was leaving or deserting or about to leave or desert the husband. We think that if that was what was intended the statute would have said so in plain unmistakable language, and that what s. 36 really means when it says no proceedings shall be taken is that no crime is committed by a wife who takes her husband's goods unless they are taken in the circumstances mentioned in the proviso to s. 36. It is impossible for us to take any other view of the meaning of s. 36 unless we are prepared to differ from the judgment of the Court for Consideration of Crown Cases Reserved in *Rex* v. *James*. (1) In that case Lord Alverstone C.J. delivered the judgment of the Court; it was a written judgment and must have been carefully perused by the other members of the Court before it was delivered, and if any objection could have been taken to the language of the judgment, there were certainly two members of the Court who would have drawn attention to it. The following passage is to be found in that judgment (2): "We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so, if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband." I specially draw attention to the words "there could be no larceny." The contention of the Crown in this case is that, even if there was no proof that the wife was liable to be prosecuted, she had

(1) [1902] 1 K. B. 540. (2) Ibid. 543.

nevertheless stolen the money, and that the appellant could, therefore, be properly convicted for receiving the money. That contention is supported by the passage from Lush on Husband and Wife to which I referred in the course of the argument, but my brother Lush has informed us that he subsequently came to the conclusion that the passage could not be regarded as a well-founded statement of the law. It clearly cannot be reconciled with the passage which I have read from *Rex* v. *James*. (1)

It is unfortunate that the Recorder did not in his summing up deal with the law applicable to a charge against a wife of stealing her husband's property, for if he had done so, it is possible that there might have been a finding by the jury which would have displaced the protection afforded by the proviso to s. 36, but in the absence of any such finding by the jury it is impossible for this Court to say whether or not the wife was guilty of larceny, and that being so it is equally impossible to support the verdict of receiving against the appellant. The conviction must, therefore, be quashed.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1902] 1 K. B. 543.

F. O. R.

[COURT OF CRIMINAL APPEAL.]

1919
Feb. 24.

THE KING *v.* JOSEPH POWER.

Criminal Law—Prosecution—No Case—Submission overruled—Evidence for Defence incriminating Defendant—Consideration on Appeal.

If at a trial of an indictment a submission is made at the close of the case for the prosecution that there is no evidence that the prisoner committed the offence, and the submission is overruled, and witnesses are called for the defence by whom evidence is given incriminating the prisoner, the Court of Criminal Appeal is entitled on an appeal by he prisoner against conviction to take into consideration the adverse evidence given by the witnesses for the defence.

Rex v. *Fraser* (1911) 7 Cr. App. R. 99 followed.

Rex v. *Joiner* (1910) 4 Cr. App. R. 64 not followed.

APPEAL against conviction.

The appellant and a man named Lewis were tried before Mr. Commissioner Rentoul at the Central Criminal Court on an indictment which charged them with having received certain goods knowing them to have been stolen. At the close of the case for the prosecution counsel for the appellant submitted that there was no evidence that any part of the stolen property had ever been in the possession of the appellant. The Commissioner ruled that there was evidence for the jury. Both prisoners then gave evidence. The prisoner Lewis, in the course of his evidence, made statements incriminating the appellant. Both the appellant and Lewis were convicted.

Fox-Davies for the appellant. The submission made on behalf of the appellant at the close of the case for the prosecution was wrongly overruled. The case should have been withdrawn from the jury. In these circumstances this Court is not entitled to take into consideration, as evidence of the appellant's guilt, the evidence that was given for the defence: *Rex* v. *Joiner*. (1)

[DARLING J. referred to *Rex* v. *Fraser*. (2)]

[Counsel also contended that the conviction ought to be quashed on the ground that there had been misdirection and insufficient direction in the summing up.]

(1) 4 Cr. App. R. 64. (2) 7 Cr. App. R. 99, 101.

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Eustace Fulton for the Crown. There was evidence given by witnesses for the prosecution that some of the stolen property was found in the possession of the appellant. But in any event this Court is not debarred from considering the effect of the evidence given by the other prisoner on the question of the appellant's guilt.

The judgment of the Court (Darling, Avory, Lush, Shearman, and Sankey JJ.) was delivered by

DARLING J. The appellant in this case was tried at the Central Criminal Court on an indictment which charged him jointly with a man named Lewis with having received certain goods knowing them to have been stolen. At the close of the case for the prosecution it was submitted by counsel for the appellant that there was no evidence that any part of the stolen property had ever been in the possession of the appellant. The learned Commissioner, His Honour Judge Rentoul, overruled this submission, being of opinion that there was some evidence for the jury. The man Lewis was then called as a witness for the defence, and was cross-examined by the appellant's counsel. In the course of his evidence he made statements which incriminated the appellant. It is now contended in support of the appeal that the prosecution failed to make any case against the appellant, and that the incriminating evidence which was given for the defence cannot be taken into consideration in this court.

The authorities in this court on this point are not in accord. A statement made by myself when delivering the judgment of the Court in *Rex* v. *Joiner* (1) was not followed by Lord Alverstone C.J. in *Rex* v. *Fraser*. (2) In that case Lord Alverstone said: "Where an objection is taken by counsel unsuccessfully, and he then calls evidence, this Court is not bound to disregard the effect of that evidence. In *Rex* v. *Pearson* (3), where the conviction was quashed, I said: 'Of course, if admissions by the defendant had supplied the evidence that was wanting, we should not have interfered

(1) 4 Cr. App. R. 64. (2) 7 Cr. App. R 99, 101.
(3) (1908) 1 Cr. App. R. 77.

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with the jury's verdict,' and in *Rex* v. *George* (1) Phillimore J. said: 'As the case proceeded to the end the Court of Criminal Appeal are of opinion that they ought to look at the whole of the evidence.' It is true that in *Rex* v. *Joiner* (2) Darling J. said: 'If there was no evidence' (of the offence) 'then it was the duty of the Court to withdraw the case from the jury. We have no right to look and see whether any evidence of larceny was elicited after the close of the case for the prosecution, when counsel for the prisoner submitted that there was no evidence to go to the jury.' At present the Court is not prepared to follow *Rex* v. *Joiner* (2), but prefers the reasoning in the other two cases." This Court agrees that Lord Alverstone's statement of the law was accurate, and that the judgment in *Rex* v. *Joiner* (2) did not put the matter rightly. It is therefore impossible to quash the conviction in this case on the ground that the case for the prosecution disclosed no evidence against the appellant. As a result of the evidence given by the other defendant, there was a case against the appellant. But the conviction of the appellant must be quashed on the ground that there was misdirection and non-direction by the Commissioner in his summing up. The defence raised by the appellant was not put to the jury.

Appeal allowed.

Solicitor for appellant: *A. Ross Dagg.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) (1908) 1 Cr. App. R. 168. (2) 4 Cr. App. R. 64.

F. O. R.

BRITAIN STEAMSHIP COMPANY, LIMITED *v.* THE KING.

1919
Feb. 17, 21.

[1918 B. 2296.]

Shipping—Steamship requisitioned by Admiralty—Charterparty—Navigating without Lights in compliance with Admiralty Regulations—Collision—Loss of Ship—"Consequence of hostilities or warlike operations"—"Cause arising as a sea risk"—Liability of Admiralty.

The steamship *Petersham* was requisitioned by the Admiralty on the terms of a charterparty which provided that "the Admiralty shall not be held liable if the steamer shall be lost . . . . in consequence of dangers of the sea . . . . collision . . . . or any other cause arising as a sea risk," but the Admiralty took the risk of "all consequences of hostilities or warlike operations." On May 6, 1918, the *Petersham*, while on a voyage with a cargo of iron ore, was being navigated at night without lights in compliance with Admiralty regulations when she came into collision with another steamship also carrying a cargo and also being navigated without lights under the same regulations, the *Petersham* being sunk. It was admitted that there was no negligence on the part of either ship, and that the collision could not have been avoided by the exercise of reasonable care and skill, being due proximately to the fact that neither vessel was showing her light. The regulations requiring ships to be navigated without lights were issued by the Admiralty with a view to safeguard British and other merchant ships from possible enemy action, but there was no evidence that any enemy submarines were present at the time of the collision:—

Held, that the compliance by a vessel, not otherwise engaged in a warlike operation, with an Admiralty regulation that vessels should navigate at night without lights in order to avoid possible attacks by submarines, was not itself a warlike operation, and that therefore the loss of the *Petersham* was not a consequence of warlike operations, but was a "consequence of collision or any other cause arising as a sea risk," and that therefore the Admiralty were not liable for the loss.

British and Foreign Steamship Co. v. *The King* [1918] 2 K. B. 879 distinguished.

PETITION of Right tried before Bailhache J., sitting as commercial judge.

The suppliants were the owners of the steamship *Petersham*, which was requisitioned by the Director of Transports on behalf of the Admiralty on the terms of a charterparty known as T. 99.

Clause 18 of the charterparty provided that "The

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Admiralty shall not be held liable if the steamer shall be lost . . . . by or in consequence of dangers of the sea . . . . collision . . . . or any other cause arising as a sea risk."

By clause 19, "the risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On May 6, 1918, the *Petersham*, while under requisition by the Admiralty, was on a voyage from Bilbao to Glasgow with a cargo of iron ore, and was being navigated without lights in accordance with Admiralty regulations. When off Trevose Head, at about 11.20 p.m., she came into collision with the steamship *Serra*, which was on a voyage from Swansea to Barcelona via Bilbao with a cargo of patent fuel, and was also being navigated without lights under the same regulations. The *Petersham* was sunk by the collision, which was due proximately to the fact that neither vessel was showing her lights. It was admitted that the collision could not have been avoided by the exercise of reasonable care and skill on the part of those on board the *Petersham* and *Serra*, and that there was no negligence on the part of either ship.

The absence of lights was in accordance with the regulations issued by the Admiralty with a view to safeguard British and other mercantile ships from possible enemy action and the consequences thereof.

The suppliants claimed that in the circumstances the loss of the *Petersham* was a consequence of hostilities or warlike operations within the meaning of clause 19 of the charter-party T. 99, and that therefore the Admiralty were liable to compensate them for the loss of the steamer.

By the answer of the Attorney-General on behalf of the King it was denied that the loss of the *Petersham* was a consequence of hostilities or warlike operations within the meaning of clause 19, and it was alleged that the loss was

caused by dangers of the sea and/or collision arising as a sea risk in respect of which it was expressly provided by clause 18 of the charterparty that the Admiralty should not be held liable.

MacKinnon K.C., *R. A. Wright K.C.*, and *C. R. Dunlop* for the suppliants. No doubt, prima facie, when a ship is lost by collision she is lost owing to a peril of the sea. In this case, however, the warranty "free from all consequences of hostilities or warlike operations" must also be taken into account. The navigating of a ship without lights in time of war and in obedience to Admiralty regulations is in itself a warlike operation within the meaning of the warranty, and inasmuch as in the present case there was no intervention of any other factor, such as bad weather or negligence on the part of those navigating the two colliding vessels, the loss of the *Petersham* was a direct consequence of the warlike operation of the two vessels navigating without lights. It is exactly the same as if two steamships pursuing zig-zag courses in order to avoid an enemy submarine came into collision in which case the loss would clearly be due to a warlike operation. The meaning of the term "consequence of hostilities" was first discussed in *Ionides* v. *Universal Marine Insurance Co.* (1) The f.c. and s. clause in that case, however, did not contain the words "warlike operations." The facts in the present case are almost identical with those in the *British and Foreign Steamship Co.* v. *The King* (2), except that the steamship which was sunk was being employed as a transport, and that she was sunk by a warship. Those two facts are however immaterial. Rowlatt J. held that the loss of the steamship was a consequence of warlike operations. The Attorney-General in the course of the argument in that case admitted that steaming without lights was a warlike operation. The Court of Appeal affirmed the decision of Rowlatt J. (3) Scrutton L.J. expressly refused to say that steaming without lights by Admiralty orders was

(1) (1863) 14 C. B. (N. S.) 259, 284. (2) [1917] 2 K. B. 769.
(3) [1918] 2 K. B. 879.

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always a warlike operation, but the judgments of Swinfen Eady M.R. and Duke L.J. both proceeded upon that assumption. Roche J. in *Inui Gomei Kaisha* v. *Attolico* (1) expressed the view that if vessels are navigating without lights, in defiance of the ordinary rules of good navigation, under express naval or military orders, for no other purpose than to protect themselves by that act from enemy action, they are engaged in warlike operations or hostilities, and none the less because their action is defensive and not offensive.

W. N. Raeburn (*Sir Gordon Hewart A.-G.* with him) for the Crown. The case of *British and Foreign Steamship Co.* v. *The King* (2) is distinguishable. The judgment of the Court of Appeal proceeded upon the admission that steaming without lights was a warlike operation, and moreover the *St. Oswald* was at the time actually engaged in a warlike operation, namely, in evacuating troops from Gallipoli, and she was sunk by collision with a French battleship engaged in the same operations. In the present case both the *Petersham* and the *Serra* were on a peaceful commercial voyage, and the two vessels in order to avoid a possible but not a proximate danger from enemy submarines increased the marine risk. There is no evidence that any enemy submarines were actually in the neighbourhood at the time of the collision. Steaming without lights is not in itself a warlike operation ; it is really an attempt to avoid a warlike operation in the same way as a person left his house in London and went into another neighbourhood in order to avoid a possible air raid. A loss incurred in an attempt to avoid a peril is not necessarily a loss by that peril : *Becker, Gray & Co.* v. *London Assurance Corporation.* (3) If an attack by an enemy submarine had been actually threatened and the two vessels had zigzagged in order to avoid it and collided the loss would then have been due to a warlike operation, but it does not necessarily follow because there has been a collision between vessels pursuing a zig-zag course that the collision is due to a warlike operation. There have been many cases of collision between

(1) Lloyd's List, July 20, 1918. (2) [1918] 2 K. B. 879
(3) [1918] A. C. 101, 108, 111.

vessels sailing without lights in which it has been held that the collision was due to negligence. The expression of opinion by Roche J. in *Inui Gomei Kaisha* v. *Attolico* (1) was obiter, and is therefore not binding. The actual decision in that case was that the loss was due to negligence, and that the navigating without lights was not the proximate cause of the collision or loss.

MacKinnon K.C. in reply. A loss incurred in an attempt to avoid a warlike operation would nevertheless be a consequence of hostilities within the meaning of clause 19: *Butler* v. *Wildman.* (2)

Cur. adv. vult.

Feb. 21. BAILHACHE J. read the following judgment:— This is a petition of right by the suppliants, the owners of the steamship *Petersham*, praying that they may be compensated for her loss under the following circumstances. [His Lordship then read the facts set out above and clauses 18 and 19 of the charterparty, and continued]: The owners of the *Petersham* contend, and the Crown denies, that the navigation of the *Petersham* without lights was a warlike operation, and that the Admiralty are liable under clause 19. I have therefore to decide whether a collision caused in the way stated would be excluded from an ordinary English policy of marine insurance by the exceptions enumerated in clause 19 of charterparty T. 99.

The words "warlike operations" were, I think, first introduced into the f.c. and s. clause in 1898, or thereabouts, and were intended to protect marine underwriters against warlike operations carried on, not by the vessel insured, but by other persons dehors the ship. When, however, those words are adopted, as they are in this case, they must be taken to cover warlike operations, not only of princes and peoples outside the ship, but of the ship herself. Primarily, I think they refer to the uses to which the ship is for the time being put. The Admiralty requisitioned ships for use as they thought proper, and have constantly employed them in

(1) Lloyd's List, July 20, 1918. (2) (1820) 3 B. & Al. 398.

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operations of a distinctly warlike character, as e.g. for coaling the Navy at sea, or, as in *The St. Oswald Case* (1), for evacuating troops from Gallipoli. In such cases a loss due directly to the warlike operations is covered by the words in question, although the actual last cause of the loss is some sea peril, such as collision. In such a case, too, it is plain that everything done by the ship for the better effecting the warlike operation in which she is engaged is part of that operation, whether it be steaming full speed ahead without lights, or whatever other steps are deemed necessary for the purpose.

Although this is, I think, their primary meaning, yet they may go beyond that, however peaceful the immediate business upon which a ship is engaged—e.g., if she is sailing as one of a convoy she is engaged, in my opinion, in a warlike operation. There the assembling, presence, protection, and movements of the King's ships protecting the convoy are a warlike operation, and both convoyed and convoying ships are taking part in it, and its character attaches to the whole flotilla, and covers the whole operation. Cases such as I have indicated appear to me to give rise to no difficulty. They are plainly covered. In some cases it might be difficult, but unnecessary, to decide whether the warlike operation is that of the ship herself or of an outside agency—e.g., two ships chased by a submarine pursue zig-zag courses and collide. There it might be said that the zig-zag courses taken are warlike operations. It would not be necessary so to decide, because such a collision as I have supposed would be clearly due to warlike operations either of the ships in collision or of the chasing submarine, and for insurance purposes the result would be the same.

None of these cases is like the present, and I must try to get to closer quarters with it. During the war it has been the practice of the Admiralty to direct vessels sailing upon peaceful ventures to take devious and unaccustomed routes to avoid submarine-infested areas. Suppose a dangerous route to be prescribed from which lights had been removed by the Admiralty to deceive the enemy, and a ship taking such a route without negligence runs ashore and is lost as the

(1) [1917] 2 K. B. 769.

direct result of the removal of the lights, would such a loss be covered by the words "warlike operations"? I think it would, but not because the ship was carrying out a warlike operation. The warlike operation in that case would be the removal of the lights. Take another case—a vessel, taking an unusual and Admiralty-prescribed course, runs without negligence upon floating wreckage or an uncharted rock and is lost, would that loss be covered by the words "warlike operations"? I think not, for the reason that in my opinion the mere taking of the prescribed route by a vessel engaged upon a peaceful errand is not a warlike operation.

This last illustration brings me close to the question in this case. It is not suggested that the *Petersham's* occupation at the time of her loss was other than peaceful. In following that occupation she was obeying Admiralty regulations to sail at night without lights. These regulations were of a perfectly general character not issued to her specifically or with reference to the voyage she was on. Sailing without lights at night was a precautionary measure to avoid submarine attacks imposed by the Admiralty upon all ships, just as was the taking an unusual course. There is no evidence of the presence of submarines at the time of the collision; no suggestion that any had been sighted, still less that she was being chased by one, and the question I have to answer, in all its naked simplicity, is this: Does the mere fact that, in order to avoid the common danger of attack by submarines, a vessel upon a non-warlike errand in obedience to Admiralty regulations sails without lights constitute a warlike operation? In my opinion it does not.

I am very sensible that in arriving at this conclusion I am differing from expressions of opinion by other judges whose opinions are entitled to at least as much weight as my own. Rowlatt J. thought otherwise in *The St. Oswald Case.* (1) In that case, however, he had not the point before him in its present form. In that case the *St. Oswald* was actually engaged in a warlike operation, and if that case had been before me I should, I hope, have decided it as he did.

(1) [1917] 2 K. B. 769.

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Roche J. had the very point before him in the case of *Inui Gomei Kaisha* v. *Attolico* (1), and considered that the sailing without lights at night in defiance of the rules of navigation was a warlike operation; but his observations in view of his actual decision were obiter.

There remains *The St. Oswald Case* in the Court of Appeal (*British and Foreign Steamship Co.* v. *The King* (2)), where the Court affirmed Rowlatt J.'s decision. I have read that decision with anxious care, and I have come to the conclusion, to use the words of Scrutton L.J. (3), that that case does not decide that "every collision where the vessels are steaming without lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation."

I naturally feel great doubts in view of these differences of opinion as to whether I am right, but I think it my duty to give effect to the view I hold. In my judgment the Admiralty regulation that vessels should navigate at night without lights greatly increased the risk of collision, but left it a marine risk, and loss due to compliance with that regulation by a vessel not otherwise engaged in a warlike operation is not due to a warlike operation and is not excluded by clause 19 of charterparty T. 99 from an ordinary English policy of marine insurance.

Judgment for the Crown.

Solicitors for suppliants: *Holman, Fenwick & Willan.*
Solicitor for Crown: *Treasury Solicitor.*

(1) Lloyd's List, July 20, 1918. (2) [1918] 2 K. B. 879.
(3) Ibid. 888.

R. F. S.

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[1917 D. 386.]

Contract—Illegality—Public Policy—Covenants in restraint of personal Freedom —Bankruptcy—Covenant entered into with Object of paying Creditors— 13 *Eliz. c.* 5.

A father, being anxious to save his son (who was of extravagant and dissolute habits) from moral and financial ruin, entered into a deed under which the son transferred such property as he had to the father, the father agreed to pay all the son's debts, amounting to more than 4000*l.*, to redeem and hand over to him all the articles pawned, of the value of more than 500*l.*, and to pay the bankrupt an annuity of 800*l.* a year, by monthly instalments, on the conditions contained in the deed, namely, that the son

(*a*) Did not become bankrupt or do or suffer any act or thing whereby the annuity if belonging absolutely to him would become vested in or charged in favour of some other person or persons or a corporation, and that he would not make any composition or arrangement with his creditors.

(*b*) Amended and reformed his mode of life and ways of living, and consistently continued in such amendment and reform.

(*c*) Gave up certain associates to whom the father objected.

(*d*) Did not reside in London or within a radius of eighty miles of Piccadilly Circus therein, and would not come to or visit London, or come within the said radius at all, unless with the previous consent of the father.

(*e*) Did not drink alcoholic liquors to excess.

(*f*) Did not borrow money or bet, or directly or indirectly have any business or personal relations with any moneylenders, bookmakers or turf accountants or their servants. The particular moneylenders referred to in (*c*) were a gang of swindlers.

The object of the deed was to save the son. For a time it had an excellent effect, but subsequently the son borrowed money again, and was made a bankrupt on the petition of a moneylender, who was the chief creditor.

In an action brought by the trustee in bankruptcy of the son for (inter alia) a declaration that the deed was void and of no effect as against the plaintiff as being against public policy and also as contravening the statute 13 Eliz. c. 5, and alternatively for a declaration that the annuity of 800*l.* a year payable by the father to the son had become payable to the plaintiff:—

Held, that the action failed on all points. Covenant (*a*) was not invalid. By the deed the son sold his property, the price being (1.) payment of his debts; (2.) payment of a conditional annuity. Covenant (*b*) was not against public policy. As to covenant (*c*), a covenant not to associate with a particular person or persons had long been familiar

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to the law. Covenant (*e*) was not against public policy. Covenant (*f*) stood in the same position as (*c*). As to covenant (*d*), in the peculiar circumstances eighty miles was not too wide, having regard to the nature and extent of the mischief to be avoided. As to the statute of Elizabeth, the deed was made bona fide and for good consideration. It neither hindered nor delayed nor defrauded creditors, nor was it intended to hinder, delay, or defraud them. Its object was to pay all the creditors, and this object was achieved.

Ex parte Eyre (1881) 44 L. T. 922 approved and followed.

ASSIGNED action tried before Sankey J. without a jury.

The action was brought by the plaintiff the trustee in bankruptcy of the estate of Gerald Denny, for (inter alia) a declaration that a deed dated April 12, 1916, made between Gerald Denny of the first part, the defendants Charles Edward Denny his father and George Warr of the second part and the defendant Charles Edward Denny of the third part was void and of no effect against him (the plaintiff) as being against public policy, and also as contravening the statute 13 Eliz. c. 5. Alternatively, he asked as against the defendant Charles Edward Denny, for a declaration that an annuity of 800*l.* a year payable under the deed by the defendant Charles Edward Denny to Gerald Denny was now payable to the plaintiff.

The following statement of the facts is taken from the judgment of the learned judge. "In this case the trustee in bankruptcy of Gerald Denny seeks to set aside a deed dated April 12, 1916, and made between the said Gerald Denny of the first part and Charles Edward Denny, his father, and George Warr of the second part, upon the ground that it is void either as being against public policy, or contravening the statute of Elizabeth. Alternatively, he asks for a declaration that an annuity of 800*l.* a year payable under the deed to Gerald Denny is now payable to the trustee, and there is a subsidiary claim in respect of certain furniture referred to in the deed. The following are the facts.

The father, Charles Edward Denny, is a wealthy gentleman residing in Ireland. He sent his son Gerald (hereinafter called the bankrupt) to the university; but, unfortunately, the boy was of a weak and idle character, was easily led, and fell into bad company. He married in 1910, and his

father provided for him liberally by a settlement dated May 30 of that year, but the bankrupt went from bad to worse, and his subsequent history is one of drink, debt and divorce.

His wife divorced him in 1915, and certain securities comprised in the settlement were allotted to her; but there was considerable property still left for him, to which his father added other stocks and shares, so that the bankrupt remained very well off. His extravagant and dissolute habits, however, did not cease, and he came to London, where he got into the hands of moneylenders. In 1915 his father paid over 14,000*l.* worth of debts for him, but the bankrupt still continued his reckless career and again large sums became due to moneylenders; almost every article of any value was pawned, and it was obvious that unless something was done he would reach the goal of the road to ruin. Under these circumstances the father saw him, ascertained what his debts were and to whom they were owing, and it is necessary, for the purposes of my judgment, to consider the position of the moneylenders, who were the chief creditors. Their names are set out in a paper writing attached to the deed. I wish to make it perfectly plain that in the following remarks I am not saying a word about moneylenders generally, nor am I mentioning the names of the moneylenders in question. They are not here to defend themselves and their names were not made public; but between the parties to the case I am bound to give effect to the evidence which was called before me and which I accept. These moneylenders actually went to Ireland to see the bankrupt, then a boy, and persuaded him to come over to London; they there induced him to start a betting business in order to get possession of his money. The bankrupt was constantly drunk, he was living with a woman who was not his wife, and they got thousands of pounds out of him. Their debts were paid off by the father, but they again induced the bankrupt to borrow money, and again took advantage of his condition and character, so that he became involved in their toils. These particular moneylenders were a gang of swindlers;

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and, having regard to one of the covenants contained in the deed which is sought to be set aside, I feel it my duty to find that every honourable and honest man would have scorned to be associated and would have refused to have any relations with them.

The father, being anxious to save his son from moral and financial ruin, took excellent advice, and in April, 1916, the bankrupt entered into the deed which is sought to be set aside. Under that deed he transferred (I use a neutral word) such property as he had to the father and the father agreed to pay all his debts, amounting to over 4000*l.*, to redeem and hand over to him all the articles pawned, of the value of over 500*l.*, and to pay the bankrupt an annuity of 800*l.* a year, by monthly instalments, upon certain conditions which are contained in clause 5 of the deed, and are as follows: "(*a*) That the beneficiary does not become bankrupt or do or suffer any act or thing whereby the said annuity if belonging absolutely to him would become vested in or charged in favour of, some other person or persons or a corporation and that he will not make any composition or arrangement with his creditors." "(*b*) That the beneficiary amends and reforms his mode of life and ways of living and consistently continues in such amendment and reform." "(*c*) That the beneficiary gives up his present associates to whom the said Charles Edward Denny objects and whose names are set out in a paper writing which for the purposes of identity has been signed by the beneficiary and the said Charles Edward Denny." "(*d*) That the beneficiary does not reside in London or within a radius of eighty miles of Piccadilly Circus therein and further that he will not come to or visit London or come within the said radius at all unless with the previous consent of the said Charles Edward Denny." "(*e*) That he does not drink alcoholic liquors to excess." "(*f*) That he will not borrow money or bet or directly or indirectly have any business or personal relations with any moneylenders bookmakers or turf accountants or their servants." Clause 6 is: "In the event of the breach or non-observance of any of the conditions contained in the last precluding clause the said

annuity or annual sum shall be absolutely forfeited and cease to be payable." The object of the deed was to save the bankrupt, who was an only son, and to pay all the creditors. The latter object was achieved; so much so that the father actually paid more creditors than appeared in the deed when he heard of their existence. For a time it had an excellent effect, but subsequently the son borrowed money again at Bournemouth, and was made a bankrupt on the petition of a moneylender, who was the chief creditor.

J. B. Matthews K.C. and *Tindale Davis* for the plaintiff.

Sir Ellis Hume-Williams K.C. and *Hansell* for the defendants.

The arguments sufficiently appear from the judgment.

The following authorities were referred to in addition to those cited in the judgment: *In re Holland* (1); *In re Lane-Fox* (2); *Whitmore* v. *Mason* (3); *Ex parte Mackay* (4); *Ex parte Williams* (5); *Ex parte Jay* (6); *Ex parte Barter* (7); *Attorney-General for Australia* v. *Adelaide Steamship Co.* (8)

Cur. adv. vult.

Feb. 4. The following judgment was read by

SANKEY J., who, having stated the facts, continued: The plaintiff asks to set aside the deed upon the grounds above stated, namely, that it is void as being against public policy, or as contravening the statute of Elizabeth. He points to covenants (*b*) (*c*) (*d*) (*e*) and (*f*) in clause 5 above set out, and quoting *Horwood* v. *Millar's Timber and Trading Co.* (9), says that these covenants so fetter the bankrupt's freedom that the deed is invalid as being against public policy. It is not necessary to sound the usual note of caution that judges are not the best expounders of public policy, but in considering questions thereunder it is permissible to recollect: (1.) The position of the parties, and (2.) the object of the restriction. And in both of these aspects *Horwood's Case* (9) differs widely

(1) [1902] 2 Ch. 360.
(2) [1900] 2 Q. B. 508.
(3) (1861) 2 J. & H. 204.
(4) (1873) L. R. 8 Ch. 643.
(5) (1877) 7 Ch. D. 138.
(6) (1880) 14 Ch. D. 19.
(7) (1884) 26 Ch. D. 510.
(8) [1913] A. C. 781.
(9) [1917] 1 K. B. 305.

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from the present one. There it was a creditor seeking to obtain from his debtor the uttermost farthing by means of a covenant which reduced the debtor, as the Court of Appeal said, to little better than a slave. The object was an entirely selfish one by which the creditor in his own interest sought to deprive the debtor of his personal freedom and the community of their right to his work and labour. Here the object of the father was not to obtain any advantage for himself, but to save his son from ruin and to induce him to become, if possible, an honourable and useful citizen. In *Horwood's Case* (1) the debtor was left with no liberty—in the present case the bankrupt was left with abundant liberty, and the only restraint was a restraint whereby it was hoped he would cease to do evil, and learn to do well. Dealing with the covenants in their order, (*b*) provides: "That the beneficiary amends and reforms his mode of life and ways of living and consistently continues in such amendment and reform." It could hardly be contended that such a covenant is against public policy—it is its object. Covenant (*c*) provides: "That the beneficiary gives up his present associates to whom the said Charles Edward Denny objects and whose names are set out in a paper writing which for the purposes of identity has been signed by the beneficiary and the said Charles Edward Denny." I have already stated my finding on this point. The bankrupt's associates, referred to in the paper writing attached to the deed, were persons with whom no honest man would desire to associate. It may well be that a covenant not to associate with honourable people would be against public policy, but I cannot think that a covenant not to associate with thieves and swindlers is against public policy. In a different class of case a covenant not to associate with a particular person or persons has long been familiar to the law. As far back as 1809, in *Lord Dormer* v. *Knight* (2) an example of such a covenant will be found, while the familiar dum casta clause is another example of a covenant limiting freedom of association. Covenant (*d*), with regard to the restriction preventing the

(1) [1917] 1 K. B. 305. (2) (1809) 1 Taunt. 417.

son coming within eighty miles of Piccadilly, I for the moment pass over. Covenant (*e*) provides: "That he does not drink alcoholic liquors to excess." A covenant not to drink to excess is not against public policy. The State itself in its licensing laws has gone halfway by forbidding a publican to serve a drunken man, and penalizing the condition of being drunk and disorderly in a public place. Covenant (*f*) provides: "That he will not borrow money or bet or directly or indirectly have any business or personal relations with any moneylenders bookmakers or turf accountants or their servants." This stands in the same position as (*c*) with which I have already dealt. I now turn to covenant (*d*): "That the beneficiary does not reside in London or within a radius of eighty miles of Piccadilly Circus therein and further that he will not come to or visit London or come within the said radius at all unless with the previous consent of the said Charles Edward Denny." This covenant has given me the greatest anxiety. It is in the nature of the well-known "radius" agreements which are usually found in restraint of trade cases. It was said in argument that this so unduly fettered the bankrupt's freedom that it made the deed bad. In my opinion, however, restraint of trade cases have nothing to do with the present case. The bankrupt was giving up no real trade—he had no real trade to be restrained. The father was not taking from the bankrupt any business which needed protection: see *Nordenfelt* v. *Maxim Nordenfelt Co.* (1), per Lord Macnaghten. Neither the community nor the bankrupt were being deprived of the bankrupt's freedom to dispose of his own labour and so to exercise his ability and experience to carry on a trade: *Mason* v. *Provident Clothing & Supply Co.* (2), per Lord Shaw. Far from it being against the interests either of the bankrupt or the community that he should not be allowed to come within eighty miles of Piccadilly, it was in the interests of both of them that he should be in an area where he had more chance and was more likely to be an honourable and useful citizen. If this covenant were capricious or unnecessary for the protection of the covenantor, or unjust to the covenantee

(1) [1894] A. C. 535, 565. (2) [1913] A. C. 724, 738, 741.

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and the community, it might be a ground for setting it aside. In my view, none of these disabilities apply. A somewhat similar covenant came before Eve J. in *Upton* v. *Henderson* (1), the facts of which were as stated in the headnote in the Times Law Reports: "The plaintiff presented a petition for divorce from his wife on the ground of adultery, and the defendant was made a co-respondent. Subsequently an arrangement was come to by which the petition was to be dismissed on the defendant's covenanting not to go within ten miles of the plaintiff's residence. Accordingly a deed of May 1, 1911, was executed by which the defendant covenanted that he would not during fifteen years go within a radius of ten miles of the plaintiff's residence upon any pretext whatever without the plaintiff's consent. The sum of 3000*l.* was paid by the defendant to the trustees of the deed to be held by them in trust for the plaintiff in case of a breach of the covenant, and the petition was dismissed. The defendant having committed a breach of the covenant by going within the area, the plaintiff claimed an injunction to restrain the breach of covenant, and also payment of the 3000*l.* Held, that the covenant was not void as being against public policy, or as infringing the liberty of the subject, and that the plaintiff was entitled to an injunction and also to an order on the trustees of the deed to pay to him the 3000*l.*" The learned judge in giving judgment said (2): "Then it was said that the covenant was contrary to public policy, because the effect of it was to exclude the defendant from a certain area, and that was a restraint of any trade which he might wish to follow. As a rule covenants in restraint of trade were contrary to public policy, but there were numerous exceptions to the rule. No doubt a covenant which contained no reference to trade might be a colourable device, and void as being in restraint of trade. But there was no such case here. The deed contained a stipulation to be found in many separation deeds, and if the defendant's contention was right, all those stipulations were void as being in restraint of trade. It was

(1) (1912) 28 Times L. R. 398; 106 L. T. 839.

(2) 28 Times L. R. 399; 106 L. T. 842, 843.

impossible to apply the rule to a covenant of this nature. In the present case, where the honour of the wife was to be protected, it seemed highly desirable to exclude the defendant from the area. Then it was said that the covenant was void as infringing the liberty of the subject. The liberty of this particular subject seemed to be something like licence. There were numerous cases in which persons bound themselves to remain in particular places, but it could not be said that such contracts were against public policy. The defence therefore on the ground of public policy failed." Those remarks are very apt to the present facts. It is true that the area of restriction in *Upton's Case* (1) was only ten miles, but I have come to the conclusion that under the present particular and peculiar circumstances eighty miles was not too wide, having regard to the nature and extent of the mischief to be avoided, and I hold that none of these covenants are void as against public policy.

The trustee then asks for a declaration that the deed is void under the statute of Elizabeth. Under that statute conveyances made with intent to hinder, delay or defraud creditors are rendered void against all creditors hindered, delayed or defrauded by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. The illegal intent under the operative part is a question of fact for the jury or judge sitting as a jury: *Glegg* v. *Bromley* (2), per Parker J. as he then was. In my judgment, the trustee's contention entirely fails. The deed was made bona fide and for good consideration. It neither hindered, delayed nor defrauded creditors, nor was it intended to hinder, delay or defraud them. Its object was to pay all the creditors, and this object was achieved; so much so that the father actually paid more creditors than appeared in the deed, when he heard of their existence. There is no ground in fact or law for saying this deed is void under the statute.

The trustee next contended that covenant (*a*) of clause 5

(1) 28 Times L. R. 398; 106 L. T. 839.

(2) [1912] 3 K. B. 474, 492.

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is invalid and that the 800*l.* payable to the bankrupt under the deed became, under the provisions of the Bankruptcy laws, payable in future to the creditors. It is beyond controversy that a man cannot by contract or otherwise qualify his own interest by a condition determining or controlling it in the event of his bankruptcy, to the prejudice of his creditors. The law is accurately so stated and the cases conveniently collected in Williams on Bankruptcy 11th ed., p. 236; but the question here is what is the proper view to take of this transaction. I listened with care to the evidence and have had my attention directed to the documents. In my view, this deed is not a settlement at all. It is a deed of sale and purchase whereby the father purchases the son's property for a covenant to pay to the son a conditional annuity and to discharge the son's debts. The bankrupt sells the property, the price being—(1.) Payment of his debts, and (2.) Payment of a conditional annuity. A somewhat similar point was decided in *Ex parte Eyre.* (1) The learned counsel asked me not to follow that case, and contended that it was bad law. It has, however, stood the test of nearly forty years. It is cited with approval in *In re Tetley* (2), and is found in all the text-books. I am of opinion that it is good law, and that finding, as I do, the present case to be one of sale and purchase for a good and proper consideration, the trustee's contention fails. The subsidiary claim is in regard to certain furniture which the bankrupt had under a hiring agreement from Messrs. Maples. The father covenanted to pay, and did in fact pay, the total amount of hire due under the hiring agreement, and it is said that the property therefore became the son's, and that when the father sold it, as in fact he subsequently did, he was guilty of a conversion of it and the trustee is entitled to its value.

[The learned judge then dealt with the evidence bearing upon this claim, and held that upon the facts the deed did not contain the whole of the transaction and that it was agreed between the son's solicitors and Sir George Lewis who represented the father that in addition to the covenants the

(1) 44 L. T. 922. (2) (1896) 75 L. T. 166.

father should pay the hiring debt, that he should be entitled to have the furniture and sell it and keep the proceeds and that the son should have no claim to the proceeds, of any sort or kind. The learned judge concluded:] This agreement was carried out some two years ago and the father became entitled to the furniture which passed to him and was his to do what he liked with, and he has been guilty of no conversion of this property.

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In the result, the trustee's action fails on all points.

Judgment for defendants.

Solicitor for plaintiff: *E. A. Fuller.*
Solicitors for defendants: *Lewis & Lewis.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

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Feb. 21, 25.

WOODALL *v.* PEARL ASSURANCE COMPANY, LIMITED.

[1918 W. 506.]

Insurance—Accident—Statement in Proposal forming Basis of Contract—Misstatement to render Contract void—Repudiation of Policy—Arbitration Clause—Condition precedent to Action.

In a proposal for insurance against accident the intending assured stated his occupation and signed a declaration that the answers to the questions therein were true, and that he agreed that the declaration should be the basis of the contract between him and the insurance company whose policy, subject to the terms and conditions thereof, he agreed to accept. The policy recited the proposal and declaration "which proposal and declaration warranted to be true it is agreed shall be the basis of this contract . . . . and be considered as incorporated herein, and any suppression, misrepresentation, or misstatement of fact in such written proposal and declaration shall ipso facto render this policy null and void"; and it provided that it was a condition precedent to the recovery of any sum under the policy that the conditions endorsed thereon should be strictly observed. Condition 8 provided that the policy might be renewed from year to year but only upon condition that nothing had happened to increase the risk, and if the risk was increased by (inter alia) the assured engaging in some other occupation, then "unless notice in writing of such increased risk is given to the

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company . . . . and any extra premium that may be required paid . . . . the policy is void and no claim can be made." By condition 11, "If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith then the assured and all persons claiming through the assured may refer and shall be bound, if the company shall so require, to refer the same to arbitration by one arbitrator to be agreed on or in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889, ... and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

During the currency of the policy the assured was killed by an accident. The company denied liability on the policy on the ground that the assured either had misstated his occupation in the proposal, or, if not, had changed his occupation for one involving increased risk of which notice as required by condition 8 had not been given to the company, and contended that the policy was therefore void, and they required the dispute to be referred to arbitration under condition 11. In an action on the policy:—

Held, first, that upon the company requiring arbitration condition 11 made the obtaining of an award a condition precedent to a right of action; and secondly, that the company by relying on the terms of the policy which rendered it void in certain events did not thereby repudiate the policy as a binding contract between the parties, and were entitled to rely upon the arbitration clause as a defence to the action.

Jureidini v. *National British and Irish Millers Insurance Co.* [1915] A. C. 499 distinguished.

APPEAL from the judgment of Shearman J. at the trial of the action without a jury.

The action was to recover 625*l.* on a policy of insurance against accident. On June 22, 1911, William Woodall filled in a proposal form for insurance against accident with the defendant company (hereinafter called the company) in which, in answer to the question what was his profession, occupation, business or trade, he stated "haulier and contractor"; and in answer to a further question as to whether he was a working master or workman he stated "master working." At the foot of the form there was the following declaration, which he signed: "I, the above-named, proposing to effect an insurance as above with" the defendants "do hereby declare that the answers given to the above questions are true, that I am in good health, and do ordinarily enjoy good health, that I am and have uniformly been of sober and temperate habits, that I am not about to engage in any

hazardous undertaking, and that I have not withheld any material information; and I agree that this declaration shall be the basis of the contract to be made between me and the company whose policy, subject to the terms and conditions thereof, I agree to accept."

The policy was issued on June 26, 1911. It recited that William Woodall, "haulier and contractor master working" (hereinafter called the assured), "caused to be delivered to the company at its chief office a proposal and declaration in writing (a copy whereof is endorsed hereon) signed by or on behalf of the assured dated the twenty-second day of June, 1911, which proposal and declaration warranted to be true it is agreed shall be the basis of this contract between the assured and the company and be considered as incorporated herein and any suppression misrepresentation or misstatement of fact in such written proposal and declaration shall ipso facto render this policy null and void and all premiums paid thereon shall be forfeited to the company"; and it insured the assured against (inter alia) death caused by accident in the sum of 500*l.* with an increase of 5 per cent. for each full complete and uninterrupted year of insurance up to the tenth year. The policy provided: "It is a condition precedent to the recovery of any sum under this policy that the several conditions endorsed hereon be strictly observed."

Condition 8: "The policy may be renewed from year to year . . . . but only upon condition that nothing has happened to increase the risk undertaken by the company. If such risk is increased as e.g. by the assured becoming intemperate or engaging in some other occupation or suffering from some physical defect or infirmity or otherwise howsoever then unless notice in writing of such increased risk is given to the company at its chief office and any extra premium that may be required paid and the policy endorsed with a notice of such increased risk under the hand of a managing director the policy is void, and no claim can be made."

Condition 11: "If any question shall arise touching this policy or the liability of the company thereunder or the extent

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or nature of such liability or otherwise howsoever in connection herewith then the assured and all persons claiming through the assured may refer and shall be bound if the company shall so require to refer the same to arbitration by one arbitrator to be agreed on or in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889, who alone shall deal with all questions including costs, or if the claimant resides in Scotland then under the Arbitration (Scotland) Act, 1894, and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

The assured, who lived near Dudley, was in partnership with his father, and they owned a barge, three carts and four horses. They hauled both by road and by water. On February 7, 1918, during the currency of the policy the assured was with another man working the barge on the Birmingham canal when in passing through a lock he accidentally fell into the canal and was drowned. An inquest was held, in the course of which the assured was described as a "boatman." The plaintiff, who was the widow and administratrix of the deceased man, claimed 625*l.* under the policy. The defendants, who had not received notice of the death before the inquest was held, made certain inquiries, and a correspondence ensued in the course of which the defendants stated that the deceased man was insured as a haulier and contractor whereas he was following the occupation of a boatman at the time of his death, an occupation which involved increased risk, and no notice of change of occupation had been given to the defendants. On April 3, 1918, an interview took place between Mr. Clark, a solicitor at West Bromwich representing the defendants, and the plaintiff's solicitor, at which Clark (according to his evidence which Shearman J. accepted as correct) stated in effect that if the deceased man was a boatman at the date of the policy the statement that he was a haulier and contractor was a misstatement of fact, and that the policy was void; that if he had changed his occupation he should have given notice to the company as required by condition 8, and the policy

was therefore void; and that the company required arbitration under condition 11. Clark before the interview had made a note for his guidance at the interview which was produced at the trial and was as follows: "Policy void by misdescription, misstatement of material facts. Alternatively void from change of occupation. In any event require arbitration under clause 11." A further correspondence followed in which the defendants required the dispute to be referred to arbitration. On April 11, 1918, the writ in the action was issued. The defendants entered a conditional appearance without prejudice to an application to set aside the writ, and they accordingly took out a summons to dismiss the action, the ground alleged being, in substance, that by reason of the arbitration clause (condition 11) in the policy there was no cause of action. The judge, affirming the order of the Master, dismissed the application upon the ground that in view of the decision in *Jureidini* v. *National British and Irish Millers Insurance Co.* (1) the question was not one to be decided under the summary procedure of the Court. The action thereupon proceeded.

The defendants in their defence pleaded that the claim was required by the terms of condition 11 to be referred to arbitration, that the plaintiff had been required by the defendants to proceed to arbitration as required by condition 11, and that they would contend that on the true construction of the condition the obtaining of an award was a condition precedent to any cause of action arising and that the claim in the action was not maintainable. They also pleaded that the deceased was not at the date of his death a "haulier and contractor master working"; that the risk insured against was increased by the deceased engaging in an occupation other than that named in the proposal and policy—namely, by engaging in the occupation of a boatman, of which notice had not been given as required by the condition and that his death was thereby caused; and that they would in any event contend that by reason thereof they were in no way liable.

(1) [1915] A. C. 499.

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The plaintiff in her reply pleaded that the defendants in a letter written before action and/or by their defence contended that the policy was null and void and that the plaintiff was not entitled to any of the benefits thereof, including the benefit of condition 11, and had repudiated the contract contained in the policy, and the plaintiff therefore said that the defendants were estopped from relying on condition 11 as a defence to the action, and could not be heard to say that the obtaining of an award pursuant to condition 11 was a condition precedent to any cause of action arising.

At the trial Shearman J. held, upon the authority of *Jureidini's Case* (1), that as the defendants were insisting under the terms of the policy that the whole policy was void on the ground of misdescription or breach of a condition in the policy, the repudiation went to the root of the contract, and the defendants could not at the same time enforce the arbitration clause in the policy. The learned judge upon the merits (2) came to the conclusion that there was no misdescription of the deceased man's occupation in the policy, and that there had been no change of occupation. He accordingly gave judgment for the plaintiff for the amount claimed.

The defendants appealed.

Vachell K.C. and *Shakespeare* for the defendants. The defendants by relying on the terms of the policy which make the contract void in certain events and requiring the dispute to be referred to arbitration under the policy have not repudiated the policy. On the contrary they are relying upon the policy as relieving them from liability, and they require the questions in dispute to be determined by arbitration. The defendants are bound to invoke the terms of the policy in order to give them a defence to the action.

(1) [1915] A. C. 499.

(2) The defendants at the trial submitted at the close of the evidence given on behalf of the plaintiff that there was no case. The learned judge decided to hear all the evidence, and preserved all the defendants' rights. The defendants then called evidence with the view of showing that a haulier and contractor meant a man engaged on land work, and that it was a different occupation from that of a boatman, which involved greater risk.

The arbitration clause (condition 11) is very wide in its terms. Any question "touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith" shall, if the company requires it, be referred to arbitration, "and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration." The policy also makes it a condition precedent to the recovery of any sum under the policy that the conditions shall be strictly observed. An award is therefore a condition precedent to a right of action, and there is no right of action till the arbitrators have decided: *Scott* v. *Avery*. (1) There has been no repudiation of the whole contract so as to deprive the defendants of their right to have the dispute settled by arbitration. In *Jureidini* v. *National British and Irish Millers Insurance Co.* (2) the arbitration clause was a very limited one, only applying to a dispute as to amount and not as to liability. The company there repudiated the contract in toto and all liability under it on the ground of fraud. The question of the arbitration clause never arose because the only question was liability, and not amount. It was not necessary to resort to the policy for the purpose of avoiding it. Fraud would avoid a policy without any stipulation to that effect. No question of amount arose for arbitration because the company repudiated the whole contract. *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (3) shows the distinction between such a repudiation of the contract as occurred in *Jureidini's Case* (2) and reliance upon a clause in the policy making the policy void in a certain event as a defence to a claim thereon. In the present case the arbitration clause covers both liability and amount, and the defendants are entitled to have the question of liability tried by the tribunal agreed upon. It is impossible to say that, because the result of going to arbitration may be that the contract will be avoided, therefore the defendants are repudiating the contract. [They also contended on the

(1) (1856) 5 H. L. C. 811. (2) [1915] A. C. 499.
(3) [1917] 2 K. B. 433.

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evidence either that the description in the proposal of the assured's occupation as a "haulier and contractor, master working" was a misstatement, as he was then a "boatman," or there had been a change of occupation since the date of the policy within condition 8; and that in either case the policy was void and the defendants were not liable.]

Disturnal K.C. and *E. W. Cave* for the plaintiff were only called upon to argue the first question. There are two forms of arbitration clause in contracts. One is the form, as in *Scott* v. *Avery* (1), where no right of action accrues until the arbitrators have made an award, and the right of action is on the award only. The other is where there is a cause of action on the contract but the procedure by arbitration is prescribed. In the latter case the Court may stay the action under s. 4 of the Arbitration Act, 1889. The arbitration clause in the present case comes within the latter class. There is a cause of action on the policy, and the defendants should have applied to the discretionary power of the Court to stay the action under s. 4 of the Arbitration Act, 1889. The arbitration is to be "under the Arbitration Act, 1889," and that brings in s. 4, and shows that the final words of this clause ought not to be construed so as to make an award a condition precedent to a right of action. The arbitration clause confers a privilege on both parties of which neither party may choose to avail himself. If, for instance, the company had brought an action for a declaration, the assured could have applied under s. 4 to stay the action. There is therefore a cause of action. Next, where the objection taken is that the whole policy is void, the objection goes to the root of the contract and the defendants cannot rely on the arbitration clause. The whole policy, including the arbitration clause, is gone. The statements in the proposal are warranted to be true and are the basis of the contract. That is a collateral contract, and, like fraud, it would invalidate the contract even if not introduced into the policy. It is immaterial whether or not it is introduced into the policy. The sole question is whether the policy is repudiated as being

(1) 5 H. L. C. 811, 847, 851, 852.

void, even though on a contractual ground, that is to say, whether the stipulation relied on by the defendants renders the whole contract void. If so, the defendants cannot insist upon the arbitration clause. That clause is gone. The contract cannot be void for one purpose and not for another; the defendants cannot blow hot and cold. In *Jureidini* v. *National British and Irish Millers Insurance Co.* (1) Lord Haldane L.C. in the course of the argument cited a passage from Lord Shaw's opinion in *Municipal Council of Johannesburg* v. *Stewart & Co.* (2) where that learned Lord said: "It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated." That is the basis of the plaintiff's contention in the present case. And in giving his opinion Lord Haldane said (3): "There has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the courts; and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract. Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced." Lords Dunedin and Atkinson based their opinions on the same ground. The effect of the decision of the House of Lords is that the law does not allow a person to repudiate a contract and at the same time to rely upon a term in it. The defendants contend that the policy is null and void, not merely that they are not liable. In *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (4) both parties agreed to arbitration, and the only question

(1) [1915] A. C. 499, 503.
(2) 1909 S. C. (H. L.) 53, 56.
(3) [1915] A. C. 505.
(4) [1917] 2 K. B. 433.

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was whether the arbitrator could determine certain matters. Moreover, the condition there did not say that upon breach the policy should be null and void, but that "all benefit under this policy shall be forfeited." In the report of that case in The Times Law Reports (1) Lord Reading C.J. after the judgment had been delivered, said that it was important to observe that in *Anderson* v. *Fitzgerald* (2) the term of the policy was that if the questions were not accurately answered the policy should be void, and not merely that it formed the basis of the contract. [*Dawson* v. *Fitzgerald* (3) was also referred to.]

Further, the defendants by calling evidence on the merits took their chance of winning on the facts, and therefore waived the point as to arbitration.

No reply was called for.

BANKES L.J. This is an action on a policy of insurance against accident. The defendants raised two defences. One defence went to the merits, and the other was that an award by an arbitrator was a condition precedent to any cause of action arising. With regard to the merits, as the matter has been argued before us it is desirable to deal with it. It was contended either that the deceased man had misdescribed his occupation when he took out the policy, or, if the description of his occupation was correct then, he had changed his occupation to one involving increased risk ; and that on one or other of those grounds the defendants were not liable. [The Lord Justice dealt with these contentions, and said that he was glad to say that he was unable to accept them, because, if they were to succeed, the effect would be to turn policies of this class (which were intended to be a simple means of securing protection for the assured or his family in the event of accident) into mere traps to catch the unwary. The assured had accurately described his occupation as understood in the district. He was a contractor hauling by water and by land, and he had not changed his occupation.]

(1) 33 Times L. R. 395, 398. (2) (1853) 4 H. L. C. 484.
(3) (1876) 1 Ex. D. 257, 260.

I pass now to the contention, which is an important one, whether the defendants are entitled to say as a defence to the action, that the plaintiff has no cause of action until the dispute has been referred to arbitration and an award has been made. That contention raises two questions. First, as to the true construction of the arbitration clause in the policy; and secondly, whether the case is governed by the decision in *Jureidini* v. *National British and Irish Millers Insurance Co.* (1) The first of these questions is whether the language of the arbitration clause is such as to give the same effect to the clause as was given to the arbitration clause in *Scott* v. *Avery* (2); or whether the clause is merely one by which the parties have agreed to refer disputes to arbitration without more, in which case the defendants cannot set up as a defence to an action that there is no cause of action, though the Court may in its discretion stay the action if one is brought. The clause is expressed in somewhat unusual terms. Under the earlier part of the clause the company may require disputes to be referred to arbitration. The defendants in the present case required arbitration. It is contended on behalf of the plaintiff that, even where the company require arbitration, the provision that the reference shall be to a single arbitrator to be agreed on or in default of agreement to two arbitrators and their umpire under the Arbitration Act, 1889, incorporates all the provisions of the Act, including s. 4, which gives the Court a discretionary power to stay an action, and that those words referring to the Arbitration Act ought to have such weight given to them as to prevent the later words being read as constituting a clause equivalent to the clause in *Scott* v. *Avery*. (2) I cannot take that view. In my opinion the words at the end of the clause are so plain that it is impossible to place that construction on the clause. It must be read as providing that, in the event of the insurance company requiring arbitration, the award of the arbitrator shall be a condition precedent to any right of action in the assured who shall have no cause of action except for the sum awarded.

(1) [1915] A. C. 499. (2) 5 H. L. C. 811.

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The next question is whether the case is governed by *Jureidini's Case.* (1) I am not able to agree with the learned judge upon this point. In considering this part of the case, it is necessary to draw a clear and sharp distinction between two separate classes of cases. One class is where the insurance company is repudiating a contract in the sense that they are disputing the existence of any binding contract at all. *Jureidini's Case* (1) falls within that class. The other is where the company is repudiating liability under the contract, but is accepting the existence of the contract as a binding contract. *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (2) is an instance of the latter class. Within which class does the present case come? The matter seems to me to depend upon the attitude of the company taken up by their representative, Mr. Clark, at the interview with the plaintiff's solicitor before the action was commenced. Did Clark repudiate the policy in the sense that he disputed the existence of any binding contract at all, or did he admit the existence of the policy but deny any liability under it in reference to the matter then in dispute and claim arbitration under the terms of the policy? I cannot agree with the learned judge that Clark repudiated the existence of any binding contract at all. The evidence on this point is contained partly in Clark's evidence, which the learned judge accepted, and partly in the note which he made for his guidance at the interview. [The Lord Justice referred to the evidence and the note.] The governing words are "in any event arbitration." The only possible meaning is this: "In any event arbitration; then our points are" so and so. The determination to maintain the right to arbitration was wholly inconsistent with a repudiation of the contract in the sense of insisting that there was no binding contract at all. It is plain from the language of condition 11 that Clark made the entry in the note as to arbitration so as to remind himself at the interview to require the dispute to be referred to arbitration. The conclusion at which I arrive is that the company never repudiated the contract in the sense I have mentioned, and that their position throughout was that they

(1) [1915] A. C. 499. (2) [1917] 2 K. B. 433.

alleged that the assured had misdescribed his occupation, or had changed his occupation, and insisted upon arbitration to have that dispute adjudicated upon; with the result, no doubt, that if the adjudication was in their favour the policy would be avoided. I cannot therefore agree with the learned judge upon this point.

How then is the case affected by the decisions in *Jureidini's Case* (1) and in *Stebbing's Case?* (2) In the former case, which is a good illustration of the first of the two classes I have mentioned, Clause 12 of the policy provided that if, among other things, the claim were in any respect fraudulent, or if any false declaration were made or used in support thereof, all benefit under the policy should be forfeited. The arbitration clause provided for arbitration in case any difference arose as to the amount of any loss or damage, and it was confined to the ascertainment of the amount of loss or damage, if any such difference arose. The insurance company alleged that the claim was fraudulent, that all benefit under the policy had been forfeited, and that there was consequently no existing binding contract between the parties; and they pleaded that it was a condition precedent to any right of action on the policy that an award of the amount of loss or damage if disputed should be first obtained. That was the question which the House of Lords had to decide. The opinions of the Law Lords do not, I think, proceed upon quite the same grounds, but all the learned Lords made it clear that the decision proceeded upon the ground that the dispute between the parties did not come within the arbitration clause at all, and that the insurance company took up the position that they repudiated the contract in the fullest sense, and that the policy had been forfeited. I do not think that it is necessary to refer in detail to the passages in the opinions of Lord Haldane L.C., Lord Dunedin, and Lord Atkinson for this purpose. *Stebbing's Case* (2) is a good example of the second class of case to which I have referred, and the language of Lord Reading C.J. makes this clear. He said: (3)

(1) [1915] A. C. 499. (2) [1917] 2 K. B. 433.
(3) Ibid. 436.

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"But the phrase 'avoiding the policy' is loosely used in reference to the circumstances of this case. In truth the company is relying upon a term of the policy which prevents the claimant recovering." And later on (1): "In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy."

In the present case the dispute between the parties is, first, whether the assured described his occupation correctly in the policy, because if he did not by the terms of the proposal and of the policy the policy would be rendered void; and, secondly, assuming he correctly described his occupation, whether he had afterwards changed his occupation for one involving greater risk, in which case by clause 8 the policy would be void and the defendants would not be liable. That being the dispute, there is an arbitration clause in the policy which provides that "if any question shall arise touching this policy or the liability of the company thereunder"—this dispute comes within those words—then if the company shall so require the assured and any person claiming through him shall be bound to refer the matter to arbitration, "and no person"—which includes the assured and anyone claiming under him—"shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration." In my opinion therefore the company, having regard to the attitude which they took up and to the terms of the policy, are right in saying that the case falls within the principle of the decision in *Scott* v. *Avery* (2), and the plaintiff has no right of action unless and until an award in the arbitration has been made, and the amount due to her has been ascertained. The appeal must therefore be allowed, and judgment entered for the defendants.

WARRINGTON L.J. I am of the same opinion. This is an action on a policy of insurance against accident. The insurance company raised two defences. First, that they

(1) [1917] 2 K. B. 437. (2) 5 H. L. C. 811.

were not liable under the policy on the ground that the assured had in his proposal for the policy misstated the nature of his occupation, or that he had changed his occupation for one involving increased risk without informing the company thereof; and, secondly, that by the terms of the policy it was a condition precedent to any cause of action thereon that an award should be obtained, condition 11 providing that "no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

With regard to the first of these two defences, which raises merely a question of fact, the learned judge has found in favour of the plaintiff. With his findings I entirely agree, and I think that any other conclusion would be lamentable, because to give effect to the kind of contentions raised here would, in my judgment, render these accident policies mere traps for unwary people to whom their attractions are mostly addressed.

The second defence is one of considerable importance. The assured made the usual proposal for insurance with, at the foot of it, a declaration stating that that proposal is to be the basis of the contract between him and the company. The policy refers to the proposal, states that the assured warrants it to be true, that it shall be the basis of the contract, "and be considered as incorporated herein and any suppression, misrepresentation, or misstatement of fact in such written proposal and declaration shall ipso facto render this policy null and void, and all premiums paid thereon shall be forfeited to the company." Then there is an arbitration clause. [The Lord Justice read it.]

The first question which arises is, What is the true construction of that arbitration clause? Arbitration clauses, speaking generally, fall into two classes. One class is where the provision for arbitration is a mere matter of procedure for ascertaining the rights of the parties with nothing in it to exclude a right of action on the contract itself, but leaving it to the party against whom an action may be brought to apply to the discretionary power of the Court to stay

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proceedings in the action in order that the parties may resort to that procedure to which they have agreed. The other class is where arbitration followed by an award is a condition precedent to any other proceedings being taken, any further proceedings then being, strictly speaking, not upon the original contract but upon the award made under the arbitration clause. Of this class *Scott* v. *Avery* (1) is the leading example. The question is within which class does the arbitration clause in the present case come? In my opinion, it comes within the second of those two classes, as in *Scott* v. *Avery* (1), and the right to bring an action depends upon the result of the arbitration. It is true that the defendants, if they pleased, might not have insisted upon this provision; they might have allowed the action to proceed without raising this defence. I do not think it matters much whether in that case the action proceeds by virtue of a new agreement arrived at between the parties by thus waiving the arbitration clause, or whether the action is founded on the original agreement. Where however one of the parties, as in this case, insists upon the arbitration clause it seems to me clear that arbitration is not a mere matter of procedure, but that proceeding to arbitration is essential to a right of action in the assured.

If that is the true construction of the arbitration clause, there arises this further question: Have the defendants elected to avoid the contract altogether with everything contained in it so as to preclude them from insisting upon the arbitration clause? This depends very much on the true inference to be drawn from the statement made by Mr. Clark, who represented the defendants at the interview with the plaintiff's solicitor. Did he repudiate the contract altogether, or did he merely deny that the company were liable, but at the same time, coupled with that denial, did he insist on the other term of the contract, namely, the right to have the difference settled by arbitration? Looking at Clark's evidence, which was accepted by the learned judge, the proper inference is that he took the latter course; that he did not do anything to repudiate the contract as a whole; that all that he did

(1) 5 H. L. C. 811.

was to insist that the company were not liable, at the same time insisting that "in any event" the difference would have to be referred to arbitration. In these circumstances, in my opinion, the judgment of the learned judge on this point was wrong. It is said that the learned judge was bound to decide as he did—and he said so himself—because of the decision of the House of Lords in *Jureidini* v. *National British and Irish Millers Insurance Co.* (1) That however was a totally different case. In the first place, there was a total repudiation of the contract. In the second place, the arbitration clause did not extend to differences as to liability under the contract; it only extended to a difference as to the amount payable under the policy. The consequence was that, if the contention of the insurance company in that case had prevailed, there would have been no means of deciding the question of the liability of the company. According to their contention it could not have been decided by the Courts, and by the terms of the arbitration clause it could not have been decided by arbitration. That difficulty was pointed out by Lord Atkinson and Lord Parmoor, and I think the same difficulty occurred to Lord Dunedin. It seems to me that we are not bound to decide this case, as the learned judge did, by reason of the decision in *Jureidini's Case* (1), the two cases being distinguishable. The present case is much more like *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (2), where it was held that what the insurance company did was not to repudiate the contract altogether, but to deny liability by virtue of some provision in the contract itself, and at the same time to insist upon having the question whether there was that liability decided by arbitration. The appeal must be allowed.

DUKE L.J. With regard to the merits, I entirely agree with the conclusion arrived at by Shearman J. and with the observations of the other members of the Court as to the effect on insured persons if any other conclusion were arrived at on facts such as those existing in the present case.

(1) [1915] A. C. 499. (2) [1917] 2 K. B. 433.

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Duke L.J.

With regard to the question of law I have little to add to the judgments which have been delivered. In my opinion the arbitration clause in this policy sets up a condition precedent to the maintenance of an action, and none the less so because making it a condition precedent is at the will of the insurance company. In the event of the company requiring arbitration as the mode of deciding the dispute no action can be brought in respect of that dispute except upon the award of the arbitrator. That construction of the arbitration clause seems to me to bring the case within the words of Lord Campbell in *Scott* v. *Avery* (1), whose judgment has usually been regarded as the leading judgment as to the effect of that decision. He said: "I think that the contract" (between the shipowner and underwriters in that case) "is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties"; and then he went on to say that the condition precedent related to the decision of questions of liability as well as to the decision of questions of amount, and among the questions of liability which he enumerated as covered by the arbitration clause was a question about want of seaworthiness, which, if proved, would have avoided the policy. In my opinion therefore the arbitration clause in the present case sets up a condition precedent to the maintenance of an action and brings the case within the authority of *Scott* v. *Avery*. (2)

The judgment of the learned judge proceeded on the view that there had been a repudiation of the contract by the defendants. If I agreed in that view I should agree in the conclusion which follows from it. Accepting Mr. Clark's evidence, as the learned judge accepted it, I differ as to its effect. Clark took up the position that the dispute was one which must be decided by arbitration, and that in the arbitration the plaintiff would be shown to have

(1) 5 H. L. C. 851. (2) Ibid. 811.

no claim under the policy by reason of its avoidance upon grounds arising upon the terms of the policy itself. He founded himself upon the policy, and not upon a repudiation of the existence of the policy. As was pointed out by Lord Reading C.J. in *Stebbing's Case* (1), the material question upon this matter of repudiation is whether what is alleged by the defendants is something which gives the go-by to the contract, that is to say, which arises outside and exists independently of the contract and avoids it by its own force, or whether what is alleged is some ground of defence arising upon the contract itself. In the present case the ground upon which it is said that the plaintiff has no claim is spelt out of the language of the contract itself. Taking this view, it seems to me that *Jureidini's Case* (2), which depended entirely upon the repudiation of the contract by the defendants, has no application. I agree therefore that the defendants are entitled to judgment.

Appeal allowed.

Solicitor for plaintiff: *Wellington Taylor, for Homer & Son, Brierley Hill.*

Solicitor for defendants: *J. M. Storer.*

(1) [1917] 2 K. B. 433. (2) [1915] A. C. 499.

W. F. B.

1919
Mar. 24, 25.

UNION CASTLE MAIL STEAMSHIP COMPANY, LIMITED *v.* BORDERDALE SHIPPING COMPANY, LIMITED.

[1916 U. 710.]

Shipping—Charterparty—Stowage—Owners responsible for proper Stowage—Chloride of Lime stowed under Deck—Damage to other Cargo.

A charterparty provided that the charterers should bear the expense of loading and discharging cargo, but "the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage and correct delivery of the cargo":—

Held, that the clause as to stowage did not amount to an absolute warranty by the shipowners, and that it merely meant that they would not be negligent in the stowage of the cargo.

Chloride of lime in iron drums, apparently in good condition, was stowed under deck by the charterers' agents, neither they nor the master knowing, or having any reason to suspect, that it would be likely to do harm by being stowed there. The iron drums were in fact defective, and fumes escaping therefrom damaged other cargo. In a question between charterers and shipowners:—

Held, that the charterparty did not impose any liability on the shipowners in respect of the damage caused to other cargo by the chloride of lime being stowed under deck.

ACTION tried by Bailhache J. as a commercial cause.

The plaintiffs, the charterers of the steamship *Border Knight*, sued the defendants, the owners of the vessel, for damages for breach of charterparty, and for breach of contract and breach of duty in and about the carriage of goods.

The following statement of facts is taken in substance from the judgment: The charterparty, dated July 26, 1915, by which the vessel was let to the plaintiffs, was on a time charter form—the hire being payable at the rate of 4470*l.* per calendar month—but it was for a round voyage. Under the charterparty the vessel loaded a general cargo at New York in August, 1915, and proceeded to Cape Town, where she arrived on November 9, 1915. Part of the cargo loaded at New York was a consignment of chloride of lime in iron drums, which was loaded under deck. When the vessel arrived at Cape Town it was found that the chloride of lime had corroded and eaten through the iron drums, and as a consequence

the lower hold was filled with fumes which seriously damaged the other cargo. Holders of the bills of lading for the cargo thus damaged made claims upon the plaintiffs. There was considerable doubt as between the plaintiffs and the defendants as to which of them, if either, was responsible to those claimants, but for business reasons it was thought proper to pay their claims, and they were paid by the plaintiffs, the question being left over for future decision as to which of the parties, the plaintiffs or the defendants, was responsible.

The plaintiffs run a line of steamers (the *Border Knight* being temporarily included in the line) between the United States and the Cape, and a firm of Barber & Co. acted as their general agents in New York to book cargo for the steamers, besides acting as stevedores in putting the cargo on board. One Captain Marshall, the plaintiffs' marine superintendent at New York, also exercised some control and supervision in the matter. The shippers of the chloride of lime in question intended that it should be shipped on deck, and the drums were marked with a cross which indicated this, at any rate to Barber & Co., and presumably also to Captain Marshall. But for some reason, connected to some extent with the stability of the steamer and because it was desired to carry a considerable quantity of coal on deck, the distinctive mark on the drums was disregarded and the chloride of lime was put under deck. The master of the *Border Knight* took no active part in the stowage of the cargo; the chief officer superintended this and made a note of the cargo coming on board, and gave the usual mate's receipts for, amongst other cargo, the chloride of lime, the drums being all apparently in good condition. The chief officer, and no doubt also the master, thus knew that chloride of lime was being put on board, and indeed some conversation took place between the master and Captain Marshall regarding it. The chloride of lime was stowed by Barber & Co. below deck with the consent and knowledge of Captain Marshall and also to the knowledge of Lloyds' surveyor at New York, who gave a certificate that the cargo was properly stowed.

The charterparty provided that the charterers should pay

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the expense of loading and discharging; and it further provided "that the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage and correct delivery of the cargo," and "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage."

The plaintiffs now claimed to recover from the defendants the sums they had paid to the consignees of the cargo damaged by the fumes, and certain other expenses which they alleged they had incurred as a consequence of the chloride of lime having been, as they said, improperly stowed. They said the drums ought not to have been stowed under deck with other cargo and/or that the master ought not to have stowed them there without inquiring into or investigating the fitness of the drums for carriage under deck.

The defendants denied that the drums were improperly stowed, and alleged that if there was negligence in the matter it was that of the plaintiffs' servants or agents. The defendants counterclaimed for damage caused to the vessel by the chloride of lime by reason, as they alleged, of the negligence of the plaintiffs or their agents.

R. A. Wright K.C. and *Stuart Bevan* for the plaintiffs. The clause in the charterparty which provides that "the owners shall be responsible for the proper stowage" is an absolute warranty by the owners. Their liability is therefore unaffected by the fact of what was done by the charterers' representatives at New York: *Sack* v. *Ford* (1); and as there was a breach of the warranty resulting in damage the defendants are bound to indemnify the plaintiffs.

MacKinnon K.C. and *Robertson Dunlop* for the defendants. The clause relied upon by the plaintiffs is not an absolute guarantee or warranty in respect of stowage. To entitle the plaintiffs to recover they must show negligence on the part of the master, and this they have not done. No doubt the clause in question imposes liability in the event of cargo being damaged by being improperly stowed in the sense that it

(1) (1862) 13 C. B. (N. S.) 90.

is, for example, insufficiently dunnaged; but with regard to goods shipped in apparently good condition, as the chloride of lime was, the clause does not impose any liability on the owners if through some latent defect in the goods or their package damage is caused. The master cannot be expected to have greater knowledge than the plaintiffs' representatives who actually stowed, or superintended the stowing, of the chloride of lime: *Ohrloff* v. *Briscall.* (1) There was therefore no improper stowage within the meaning of the clause.

R. A. Wright K.C. in reply. Approval by the stevedores as to the stowage of the chloride of lime under deck does not absolve the shipowners from their express obligation. The master ought to have satisfied himself that the drums were sufficient and he failed to do so.

[*Hutchinson* v. *Guion* (2) and *Brass* v. *Maitland* (3) were also referred to.]

BAILHACHE J. after stating the facts continued: The plaintiffs claim that they are entitled to be indemnified by the defendants, the owners of the *Border Knight*, in respect of the claims they have paid, and they base this claim upon the clause in the charterparty which provides "that the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage and correct delivery of the cargo." I think there can be no doubt that as between the shippers of goods and the shipowners, the charterparty being in the form in which this one is, the shippers would have a claim (apart from any provisions of the bills of lading) against the owners for damage to their goods, but the present case is not one between shippers and owners but between charterers and owners. It must be borne in mind that the *Border Knight* was running in this line, and that when she arrived at New York, the owners had nothing more to do with her so far as the cargo was concerned apart from the clause in the charterparty. The cargo was booked and put on board by Barber & Co., to some extent superintended by Captain Marshall. In these circumstances

(1) (1866) L. R. 1 P. C. 231. (2) (1858) 5 C. B. (N. S.) 149.
(3) (1856) 6 E. & B. 470.

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Bailhache J.

it would seem strange if the owners were still to be liable for improper stowage. The charterparty, however, says that "the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage." If there had been any improper stowage in the sense that the drums containing the chloride of lime were not sufficiently dunnaged or were stowed in some way that the damage was caused by the physical act of stowage, I think the owners would have been liable. But that is not the case here. So far as the physical stowage of the drums was concerned it was perfectly unobjectionable. The damage that happened was due to the fact that the chloride of lime corroded the drums and the fumes escaped. Chloride of lime has this action upon iron receptacles. If the drums have wooden ends I understand that damage does not arise, nor if the drums are protected by being painted or varnished inside. When the drums in question were presented for stowage no one could tell whether they were protected in this way or not. Chloride of lime is a commodity which is constantly carried and generally without any ill effects; but sometimes, and to the knowledge of Barber & Co., damage has resulted from its carriage. In this case I have to consider whether the stowage was improper in the sense that the master of the *Border Knight* ought to have been so far suspicious of the cargo as to have either kept it on deck or have inquired whether the drums were properly protected, because I do not read the clause "the stowage shall be under the control of the master, and the owners shall be responsible for the proper stowage" as an absolute warranty, like a warranty of seaworthiness; I read it merely as meaning that the owners will not be in any way negligent in the stowage of the cargo. It would be a strange thing if it were to be held to be an absolute warranty, for if so the master might have presented to him some cargo he had never heard of before, and if it did damage which he had no reason to suspect his owners would be liable. I cannot press the language of the clause as far as that.

I have therefore to find whether there was any negligence

on the part of the master in allowing the chloride of lime to be stowed under deck. Notwithstanding that the stowage was effected by Barber & Co. and superintended by Captain Marshall I should be of opinion that the master, if he knew or ought to have known that the chloride of lime was likely to cause damage, ought to have stopped the stowage and refused to carry it or to have carried it on deck. There is however no evidence that the master knew that chloride of lime would do any harm. Barber & Co. had had some unfortunate experience on a previous occasion, but apparently they had no suspicion that this chloride of lime would do any harm if stowed below deck, nor did Captain Marshall, nor did Lloyds' underwriters' surveyor. In those circumstances I am not prepared to impute to the master a state of knowledge which was not shared by the plaintiffs' agents and the others I have mentioned. The truth is if the drums had been protected in the way suggested no harm would have been done. I have come to the conclusion that no negligence is to be imputed to the master, and negligence being necessary to enable the plaintiffs to succeed, the action fails.

There is a counterclaim, but for it to succeed I would have to find negligence on the part of Barber & Co. or Captain Marshall. I find no negligence on their part and consequently the counterclaim also fails.

Judgment accordingly.

Solicitors for plaintiffs : *Parker, Garrett & Co.*
Solicitors for defendants : *W. A. Crump & Son.*

J. S. H.

C. A.
1919
Feb. 17.

[IN THE COURT OF APPEAL.]

OMNIUM D'ENTERPRISES *v.* SUTHERLAND.

[1918 O. 373.]

Shipping—Charterparty—Requisition of Ship by Admiralty—Suspension of Hire under Charter during Requisition—Sale of Ship during Suspension—Repudiation of Contract.

By a charterparty in 1916 the steamship *Robert Bruce*, then building, was chartered by the defendant to the plaintiffs for three years from the time she was fit to sail. The charterparty provided that should the steamer that was to carry out the charter be lost either before or during its fulfilment the defendant was to provide another steamer of a similar size, class and description on the same terms and conditions; and that should the steamer be requisitioned by the Admiralty the owner and charterers were to be held harmless, and any time during which the steamer might be used by the Admiralty during the existence of the contract should be for owner's account and hire under the contract should cease for such period, the contract to be prolonged by such period as the steamer might be under requisition, so that the full three years' contract between owner and charterers should be carried out. The steamer, when completed, was requisitioned by the Admiralty and still remained under requisition. While the steamer was under requisition the defendant sold her free from charter engagements, and the purchasers refused to undertake to carry out the charterparty. The plaintiffs claimed damages from the defendant for breach of the charterparty, contending that by the sale of the steamer the defendant had wrongfully repudiated the charterparty and put it out of his power to perform it:—

Held, that the defendant, by the sale of the steamer, had repudiated the charterparty, and was liable in damages.

Appeal from the judgment of Rowlatt J. at the trial of the action without a jury.

The action was to recover damages for breach of a charterparty dated July 10, 1916. By the charterparty—which was headed "The Baltic and White Sea Conference. Uniform Time Charter, 1912. For European, etc., Trade. As revised Berlin, 1912"—the defendant chartered to the plaintiffs the steamship *Robert Bruce*, then building at Middlesbrough, for thirty-six calendar months, at a certain rate per calendar month, commencing from the time the steamer was fit to sail, payment to be made in London monthly in advance.

The steamer was to be delivered under the charter when completed and fit to sail at Middlesbrough. A clause in the charterparty provided that "should the steamer that is to carry out this charter be lost either before or during its fulfilment owner to provide another similar size class and description steamer on the same terms and conditions." There was also a clause that "should the steamer be requisitioned by the British Admiralty owner and the charterers are to be held harmless and any time . . . . which the steamer may be used by the British Admiralty during the existence of this contract shall be for the owner's account, and hire under this contract shall cease for such period; the contract however shall be prolonged by such period or periods as the steamer may be under requisition, so that the full three years' contract between owner and charterers shall be carried out."

After the building of the steamer was completed she was, in July, 1917, requisitioned by the Admiralty, and she remained under requisition from that time, and still remained so. On March 6, 1918, the defendants sold the steamer to the Palace Shipping Company, Limited, without providing with them for the fulfilment of the charterparty. The agreement of sale provided that the purchasers should assume liability for the requisition service of the steamer as from the date of transfer, but that the steamer should be delivered free from any other charter engagements. The transfer was duly completed and registered.

When the plaintiffs heard of the sale a correspondence ensued, in the course of which the managers of the Palace Shipping Company wrote to the plaintiffs' solicitors that they had heard nothing about the steamer having been chartered, and could not undertake to carry out the charterparty. The plaintiffs thereupon on May 30, 1918, issued the writ in the action by which they claimed damages for breach of the charterparty, alleging that the defendant, by the sale of the steamer without providing for the fulfilment of the charterparty, had wrongfully repudiated and determined the contract and put it out of his power to perform it. At

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the trial the defendant stated in his evidence that he had always intended, and still intended, to fulfil the charterparty.

Rowlatt J. held that there had been a wrongful repudiation of the charterparty by the defendant, and gave judgment for the plaintiffs.

The defendant appealed.

A. Neilson for the defendant. The defendant by the sale of the steamer free from liability under the charterparty, did not repudiate the contract under the charterparty. He did not thereby put it out of his power to perform the contract. By a clause in the charterparty, if the steamer were lost the defendant was entitled to provide another steamer of a similar kind. That obligation has not been interfered with by the sale. To constitute a repudiation the circumstances must be such that in no event will the owner be able to perform the contract. There is one event, at any rate, in which the defendant has not put it out of his power to perform the contract. Further, when the requisition of the ship comes to an end, the defendant can either repurchase the ship or charter her and so perform the contract with the plaintiffs. There might be a redemise of the ship to him: *per* Phillimore L.J. in *Fratelli Sorrentino* v. *Buerger*. (1) A reservation on the sale of the ship of the right to carry out the charterparty cannot affect the question. The obligation as between the defendant and the purchasers cannot affect the position as between the plaintiffs and the defendant. The action is therefore premature. As Atkin J. said in *Fratelli Sorrentino* v. *Buerger* (2), "I should be surprised to think that a shipowner who has once entered into a binding engagement to let his ship, whether by voyage charter or by time charter, was precluded from disposing of it except at the risk of having the engagement put an end to on the ground that he has precluded himself from its performance." In that case it is true that by the contract of purchase the purchasers accepted the execution of the charterparty, but that does not affect the obligation as between the plaintiffs

(1) [1915] 3 K. B. 367, 370. (2) [1915] 1 K. B. 307, 314.

and the defendant under the charterparty contract. In the Court of Appeal (1) the decision of Atkin J. was affirmed on the findings of the umpire.

R. A. Wright K.C. and *Le Quesne* for the plaintiffs were not called upon.

BANKES L.J. This seems to me to be a clear case. On July 10, 1916, the defendant, who was in a position to dispose of a steamer then being built, chartered her to the plaintiffs for three years from the time she was fit to sail. The charterparty contained a requisition clause. [The Lord Justice read it.] Upon completion the steamer was requisitioned, and it is plain that by the terms of the charterparty she remained under charter to the plaintiffs in spite of the requisition, but the operation of the charterparty in the sense of giving to the plaintiffs possession of the steamer was suspended during the requisition. While the charterparty was thus suspended, the defendant sold the steamer without any reservation, and the plaintiffs on hearing of the sale took steps to see whether the purchasers would perform or allow the performance of the charterparty; but no arrangement could be made. The learned judge had to decide whether the sale of the steamer out and out was a repudiation by the defendant of the contract, and he held that it was. I agree with him. The defendant put it out of his power to perform his part of the contract, inasmuch as from the moment he sold the steamer he no longer had the power as of right to hand her over to the plaintiffs on completion of the period of requisition. He says now that he feels sure that he will be able to get possession of her at the proper time. That however is very different from being able to say that the steamer is his and when the time comes he will give the plaintiffs possession of her. It is substituting a chance for a certainty. In my opinion *Fratelli Sorrentino* v. *Buerger* (2) tells strongly against the defendant. In the Court of Appeal the decision proceeded entirely on the ground that the owners of the vessel, though they had sold her, had

(1) [1915] 3 K. B. 367. (2) [1915] 1 K. B. 307; 3 K. B. 367.

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OMNIUM D'ENTERPRISES v. SUTHERLAND.

Bankes L.J.

reserved to themselves the power personally to perform the contract. The umpire so found as a fact, and upon that finding this Court based its judgment. In the judgment which I delivered I tried to imagine cases in which a sale of a ship would not operate as a repudiation of the contract. I said (1): "It is not however every parting with a ship, whether by sale or otherwise, while she is under charter which puts it out of the power of the vendor to perform the obligations (if any) which he has undertaken to perform personally. For instance, possession may not have to be given under the contract of sale until after the charter is performed, or the vendor may by express terms reserve the right to perform personally the obligations of the charter, or the vendor and the purchaser may agree, without precisely defining how it is to be done, that the vendor shall retain the right in spite of the sale of the vessel of satisfying any requirement of the charterer as to personal performance by the vendor of any of the obligations of the charterparty." It seems to me to be plain from the judgments delivered by the members of the Court of Appeal that they were all of opinion that a sale of the ship and the parting with the possession of it, even with a term imposing upon the purchaser the obligation of performing the charterparty, would have been a repudiation of the contract. In this case the defendant did not even impose that term. The appeal must be dismissed.

WARRINGTON and DUKE L.JJ. agreed.

Appeal dismissed.

Solicitors for plaintiffs: *William A. Crump & Son.*

Solicitors for defendant: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

(1) [1915] 3 K. B. 372.

W. F. B.

DOEY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

1919
Feb. 21, 28.

Carrier—Railway—Article above Ten Pounds in Value—Glass—Damage—Defence of Carriers Act—Special Contract—Evidence—Nature and Value of Article not disclosed—Article to be insured—Estoppel—Carriers Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *ss.* 1, 2, 6.

The plaintiff sold a silver-plated lamp with a glass bowl to a purchaser to whom it was to be sent by the railway of the defendants. The plaintiff packed the silver-plated portion of the lamp, and the glass bowl which was admitted to exceed 10*l.* in value, in separate parcels, and having addressed both parcels to the purchaser and labelled them "Glass, with care," and "Insured," took them to a parcel receiving office of the defendants. As regards glass and other articles specified in the Carriers Act, 1830, and exceeding 10*l.* in value, the defendants had affixed in the office, under s. 2 of the Act, a notice headed "Insurance," which stated the increased rates of charge to be paid to the defendants in order to render them liable for injury to these articles. As regards articles of less value than 10*l.* the defendants had two separate rates of charge, a lower or "owner's risk" rate, and a higher or "company's risk" rate. The plaintiff handed the parcels to the clerk at the office, stating their destination, and that he wished them to be insured; but did not declare under s. 1 of the Act the value and nature of the property contained in either of the parcels. The clerk, having weighed each parcel separately, stated the total charge for both, which the plaintiff paid. The charge made was, in fact, the "company's risk" charge for glass of less value than 10*l.*, and was less than the charge stated in the notice for glass above that value, but the plaintiff was not aware of this. The glass bowl was broken in transit. In an action by the plaintiff against the defendants to recover the amount of the damage, the facts stated above were proved:—

Held, that there was no "special contract" between the plaintiff and the defendants under s. 6 of the Act of 1830 for the carriage of the glass bowl; that the defendants were not estopped from denying that there was a special contract; and, consequently, that the defendants were not excluded from the protection given by s. 1 of the Act, and that the plaintiff could not recover.

Appeal from the Bloomsbury County Court.

The plaintiff, George William Doey, who carried on business at 18 and 19 Great Russell Street, London, W.C., sold to a customer in Glasgow a silver-plated electric light table lamp with a cut-glass and engraved bowl for 10*l.* 10*s.* The plaintiff packed the silver-plated portion of the lamp and the glass

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bowl in separate parcels, each of which he addressed to the customer and labelled "Glass, with care" and "Insured." On July 3, 1918, the plaintiff took the two parcels to a receiving office of the defendants, the London and North Western Railway Company, in Bond Street, London, W. As regards glass and other articles mentioned in the Carriers Act, 1830, and exceeding 10*l.* in value, the defendants had affixed in that office a notice under s. 2 of that Act, which set forth the increased rates of charge to be paid to the defendants for the carriage of these articles in order that they should be liable for loss of or injury to these articles, and showed that different charges were made in respect of different kinds of glass and other articles. The notice was headed "Insurance," it described the increased rates of charge for articles of that class as "the insured rate," "rates for the insurance," and "insurance charges," and it showed that different charges were made for different kinds of glass. As regards articles of less value than 10*l.* the defendants had two separate rates of charge, a lower or "owner's risk" rate, and a higher or "company's risk" rate. The plaintiff handed the two parcels to the clerk at the office, stating that they were for Glasgow, and that he wished that they should be insured. He did not, however, declare under s. 1 (1) of the Act the value and nature of the

(1) Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1: ". . . . no mail contractor, stage coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following: . . . . glass, ... contained in any parcel or package which shall have been delivered . . . . to be carried for hire . . . . in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried . . . . as aforesaid the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Sect. 2: ". . . . when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail

property contained in the parcels. The clerk, having weighed each parcel separately, stated that the total charge was 5*s*. 5*d*., and the plaintiff paid that amount. The plaintiff produced his parcel book containing his own entry of the consignment, which the clerk filled up with the amount of the charge made, and initialled. On the arrival of the parcels at Glasgow it was found that the glass bowl had been broken in transit.

The plaintiff brought the present action against the defendants in the Bloomsbury County Court claiming 10*l*. 10*s*. in respect of the damage. The defendants alleged in defence that ss. 1 and 2 of the Act of 1830 had not been complied with.

The plaintiff gave evidence, the effect of which is stated above, as to what took place at the receiving office. He also stated that he was not asked any question as to the contents of the parcels or their value; that nothing was said about the different "owner's risk" and "company's risk" rates; and that he did not know that the charge of 5*s*. 5*d*. was the "company's risk" rate for glass applicable to these parcels, or how that sum had been calculated. He further said that he had tried to get the glass bowl replaced, and found that it would cost about 20*l*. to make one like that which had been broken.

The clerk from the defendants' receiving office said that the plaintiff did not tell him and he did not know the value

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contractors, stage coach proprietors and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Sect. 6: ". . . . nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandizes."

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or nature of the contents of the parcels; that the charge of 5*s.* 5*d.* was made up of 3*s.* 6*d.* for the heavier parcel and 1*s.* 11*d.* for the lighter, that these were the proper charges for parcels of the particular weights at "company's risk" rates on glass under the value of 10*l.*; and that the charge for insuring a parcel containing glass over the value of 10*l.* would have exceeded the charge made by 3*d.*

The county court judge found that as regards the parcels in question there was a special contract under s. 6 of the Act of 1830, by virtue of which the defendants were excluded from the protection given by ss. 1 and 2 of the Act, and he gave judgment for the plaintiff, with leave to appeal.

The defendants appealed.

Disturnal K.C. and *Eustace Hills* for the defendants. As the article in question consisted of glass above the value of 10*l.*, it was within s. 1 of the Carriers Act, 1830, and the defendants are not liable for the injury done to it unless, either under that section the plaintiff declared the value and nature of the article and paid the increased charge, or under s. 6 the parties entered into a special contract for the carriage of the article. The plaintiff did not adopt the former of these courses, and therefore the defendants are not liable unless, as the county court judge has held, there was a special contract under s. 6. A contract is not a special contract under that section unless its provisions are inconsistent with the carrier's exemption from liability under s. 1 in respect of articles of the kinds mentioned in the latter section and exceeding 10*l.* in value: *Baxendale* v. *Great Eastern Ry. Co.* (1) and *per* Wright J. in *Shaw* v. *Great Western Ry. Co.* (2) In order that a contract should be inconsistent with that exemption it must render the carrier liable in respect of an article of one of the kinds mentioned whose value exceeds 10*l.* In the present case it does not appear that there was any contract relating to an article which exceeded that sum in value. The plaintiff did not declare to the defendants' clerk, and the latter did not know, that the value of the

(1) (1869) L. R. 4 Q. B. 244. (2) [1894] 1 Q. B. 373, 379.

article exceeded 10*l.*, and the plaintiff's statement that he wished the article to be insured did not imply that it exceeded that sum in value, because articles of less value than 10*l.* are specially insured by the defendants on payment of the "company's risk" charge. That being so, it must be taken that it was the intention of the defendants' clerk to contract with reference to an article whose value did not exceed 10*l.* If that was also the intention of the plaintiff, then no doubt there was a contract between the parties, but it was a contract which related to an article of less value than 10*l.*, and therefore it was not a special contract under s. 6. If, on the other hand, it was the intention of the plaintiff to contract with reference to an article which exceeded 10*l.* in value, then there was no consensus ad idem between the parties and therefore no contract at all. As the plaintiff led the clerk to suppose that he intended to contract for the carriage of an article of less value than 10*l.*, the defendants are not estopped from denying that there was any intention on the part of the clerk to contract in respect of an article of greater value.

Giveen and *Bickmore* for the plaintiff. There was here a special contract under s. 6 of the Carriers Act, 1830, which excluded the exemption from liability which the defendants would otherwise have enjoyed under s. 1. In the absence of any contract preventing its operation, s. 1 of the Act exempts a carrier from all liability in respect of an article of a kind to which this section applies and of greater value than 10*l.*, but it leaves him subject to his common law liability as an insurer in respect of all other articles. As the parcel which contained the article in question was labelled "glass" the defendants' clerk knew that the article was of a kind to which that section applied, and when the plaintiff told him that he wished the article to be "insured" he plainly informed him that it was an article which exceeded 10*l.* in value. It must therefore be supposed that it was the intention of the defendants' clerk to contract with reference to an article which came within the Act and exceeded that sum in value, and as that was the intention of the plaintiff it must be taken that there was a special contract between

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the parties under which in consideration of the charge paid the defendants became bound to insure the article. The term "insurance" is not appropriate to describe the higher care exercised by the defendants in respect of articles to which the Act does not apply on payment of the "company's risk" charge, and when the defendants' clerk was asked to insure the article it cannot be supposed that he thought that it was an article of less value than 10*l.* which was to be charged at "company's risk" rate.

Disturnal K.C. in reply. The term "insurance" when used in connection with a contract of carriage does not denote an absolute insurance, but the ordinary insurance afforded by a carrier, and it would naturally and properly be understood as applying to the higher degree of care taken by the defendants on payment of their "company's risk" charge.

Cur. adv. vult.

Feb. 28. The following judgments were read:—

AVORY J. Two parcels were delivered by the plaintiff at a receiving office of the defendants for transmission to Glasgow. One of them contained a silver-plated standard of a table lamp; the other the cut-glass globe of the lamp. They were both labelled "glass" and "insured." The glass globe was above the value of 10*l.*, and was damaged in transit. The value was not declared at the time of delivery, and therefore prima facie the defendants were, under the provisions of s. 1 of the Carriers Act, 1830, not liable for loss or injury to the article; but the county court judge has found that there was a special contract within the meaning of s. 6 of the Act, and has awarded to the plaintiff 10*l.* 10*s.* damages. The question for this Court is whether there was any evidence upon which he could so find. He has accepted the evidence for the plaintiff that when he delivered the parcels at the office he said he wished them to be insured, that the clerk having weighed them said the charge would be 5*s.* 5*d.* for the two, and the plaintiff paid that sum. No question was asked and nothing said about the value, and nothing was said about the different rates for goods carried at owner's

risk and company's risk, and the plaintiff did not know that the sum charged was the ordinary rate for glass carried at the company's risk as distinguished from the owner's risk. The evidence of the receiving clerk was that the sum charged was in fact the ordinary rate on glass up to 10*l.* in value carried at company's risk, and that upon glass over 10*l.* in value if insured an extra rate would have been charged.

The notice affixed in the office in compliance with s. 2 of the Carriers Act, of which the plaintiff is deemed to have knowledge, is headed "Insurance"; it describes the increased rates as "the insured rate," "Rates for the insurance," and "Insurance charges," and s. 3 of the Act contains the same description, and at first I was disposed to think that the judgment could be supported on the ground that the county court judge must have come to the conclusion upon the evidence that the plaintiff having expressed his intention to effect a special insurance was induced by the conduct of the clerk to believe that he had done so, and that the defendants were estopped by such conduct from denying that a special contract had been entered into, which would render them liable notwithstanding the exemption conferred upon them as common carriers by s. 1. But though I hesitate to differ from this learned county court judge, especially as we do not know the grounds of his judgment, I have come to the conclusion that no such estoppel can be relied on in this case for the reason given by Lord Brampton in *Whitechurch* v. *Cavanagh* (1): "In my judgment no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel." That passage was cited and acted upon in *Porter* v. *Moore*. (2) The plaintiff in this case concealed the material fact that the parcel was above the value

(1) [1902] A. C. 117, 145. (2) [1904] 2 Ch. 367, 373.

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of 10*l.*, and thereby induced the clerk to act as he did, and if in the circumstances no estoppel arises, it is clear the parties were not ad idem and there was no special contract.

LUSH J. The question we have to decide in this case is whether there was any evidence to support the finding of the learned county court judge that there was a special contract between the plaintiff and the railway company such as to exclude the operation of s. 1 of the Carriers Act, 1830. That means of course a special contract binding on the company. The contract alleged was a contract by the company to insure the plaintiff's goods which were over 10*l.* in value against loss or damage during transit.

The position when the contract of carriage was made was this. The goods consisted of silver plate in one package and cut glass in the other. They were both in fact labelled "glass." Being over the value of 10*l.* they were subject to the provisions of the section, so that, in the absence of a special contract which excluded that section, the company would not be liable as common carriers, in other words not liable as insurers, unless the plaintiff declared their nature and value and paid or undertook to pay the extra charges specified in the notice, which was required by the Act to be, and was, duly exhibited in the office where the plaintiff delivered the goods for carriage. This notice showed quite plainly that the proper charges could not be ascertained unless the value of the goods was declared, and unless the description of the glass was given, as different charges were payable for different kinds of glass. The plaintiff by s. 2 of the Act was bound by this notice whether or not he knew in fact of its terms. Now, according to the learned judge's finding, the plaintiff said that he wished to have the goods insured. He did not state what their value was. He did not state that they were over 10*l.* in value. He did not correctly or sufficiently describe them. The clerk, in the belief that the goods were not of the value of 10*l.*—he had never been told to the contrary—accepted them for carriage and charged the appropriate sum.

It is clear on these facts that there was no special contract

in fact. The parties were not ad idem. There was no consensus. They were dealing with two different classes of goods. Moreover, the alleged contract was one which the clerk had no authority to make, and the plaintiff who was bound by the notice either knew or ought to have known it. There was no consideration to the company for the alleged special contract.

Then is the company estopped from denying that there was a special contract? Clearly not, in my opinion. The company never held out the clerk as authorized to contract to carry the goods on terms other than those specified in the notice of which the plaintiff had constructive notice. The clerk again made no representation to the plaintiff to the effect that he was acting or was authorized to act contrary to the terms of the notice and that he was undertaking to have the goods carried at a rate which bore no relation to their value. He was never told that they were over the value of 10*l*. Before estoppel can be relied on it must be shown that all the necessary information was given. If material facts are concealed there can be no estoppel. Moreover, estoppel only supplies evidence and enables a contract to be proved which cannot be proved without it. If, when proved, it cannot be relied upon because it was made without authority, estoppel does not assist the party who sets it up. The truth is that here the mistake was caused entirely by the acts and omissions of the plaintiff. Whether or not he knew of the difference between "company's risk" and "owner's risk" contracts, his language would only convey to the clerk that he wished his goods carried at the company's risk, and he has failed to prove any special contract by which the company gave up or renounced their right to rely on the protection of the statute.

The appeal, therefore, should in my opinion be allowed, and judgment entered for the defendants, with costs here and below.

Appeal allowed. Judgment for defendants.

Solicitor for appellants: *M. C. Tait.*

Solicitors for respondent: *Henry Pumfrey & Son.*

J. R.

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Feb. 20, 21.

BRITISH INDIA STEAM NAVIGATION COMPANY *v.* GREEN & OTHERS AND LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED.

[1918 B. 1791.]

Insurance (Marine)—War Risk—"Warlike Operations"—Sailing with Convoy.

By a time policy a steamship was insured against war risks. The material clause in the policy insured the vessel against "all consequences of hostilities or warlike operations by, or against, the King's enemies."

By another time policy the steamship was insured against the usual marine perils, including perils of the seas. The policy contained an f.c. and s. clause, the material words of which were "warranted free from . . . . all consequences of hostilities or warlike operations. . . . ." During the time covered by the policies the steamship, one of four merchant steamships carrying cargoes of cotton, while proceeding under convoy ran upon some rocks and, after lying there some hours, was torpedoed. Her position was hopeless from the first, and even if she had not been torpedoed she would still have been a total wreck. The vessels were zigzagging, the night was dark, they were upon an unaccustomed course, and the currents were variable and of unknown direction and force. The master was under the orders of a King's officer and was not responsible for the course taken. His business was to keep his position relatively to the other three ships. There was no negligence proved either on the part of the master or the King's officer:—

Held, that the loss fell upon the war risks policy. To sail with convoy was a warlike operation. The assembling of the ships to be convoyed and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen, and the precautionary measures taken on the voyage must be taken together as all part of a warlike operation. The stranding —although prima facie a marine peril—happened in the course of this warlike operation, and was directly due to it. The loss was therefore the consequence of a warlike operation.

Semble, if the stranding had been due to the negligence of the master the loss would not have been caused by a warlike operation, but had there been negligence on the part of the King's officer the operation would still have been a warlike operation though badly performed.

ACTION in the commercial list tried before Bailhache J.

The action was brought as against the defendants, the Liverpool and London War Risks Insurance Association, Ltd., to recover a loss under a policy of insurance of the plaintiffs' steamship *Matiana* against war risks; and alternatively as against the defendants Green and others to recover

the loss under a policy of insurance of the *Matiana* against marine risks.

By a time policy dated March 13, 1918, the defendants, the Liverpool and London War Risks Insurance Association, Ltd., insured the *Matiana* in the sum of 25,500*l.* against war risks for 91 days from March 13, 1918. The material clause in the policy insured the vessel against "all consequences of hostilities or warlike operations by or against the King's enemies." By a time policy dated December 24, 1917, subscribed by the defendant Green and other underwriters, in the sum of 284,760*l.*, the *Matiana* was insured against the usual marine perils, including perils of the seas, for 12 months commencing on November 1, 1917. The f.c. and s. clause contained in the policy (so far as material) was "Warranted free from capture, seizure . . . . and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. . . . ."

The *Matiana* was one of four merchant steamships proceeding under convoy from Alexandria to the United Kingdom. She and the other merchant steamships were carrying cargoes of cotton. At midnight on May 1, 1918, when in the Mediterranean she ran into the Keith Rocks. After lying there some few hours she was torpedoed. Efforts were made to get her off, but failed. There was a gale on May 5, and she became a total wreck. Her position was hopeless from the first, and even if she had not been torpedoed she would still have been a total wreck. The vessels pursued a zigzag course, and were sailing at the time of the stranding through a submarine-infested area and some 30 miles to the northward of the ordinary peace-time course. The master of the *Matiana* stated that he was nine miles north of his reckoning, and by that much nearer the rocks. The vessels were zigzagging, the night was dark, the vessels were upon an unaccustomed course, and the currents were variable and of unknown direction and force. The master was under the orders of a King's officer, and was not responsible for the course taken. His business was to keep his position relatively to the other three ships. A King's officer who had been in charge of convoys

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gave evidence to the effect that a master must obey orders. He may signal if he thinks it needful for permission to execute any manœuvre of his own, and must wait until permission is given. Moreover, at night signalling by lights is not allowed. There were no lights upon the Keith Rocks, and there were no breakers ahead. There was no negligence proved either on the part of the master of the *Matiana* or the King's officer.

Mackinnon K.C. and *Lewis Noad* for the plaintiffs. The loss falls upon the war risks underwriters. Sailing with convoy and taking a zigzag course under the directions of the King's officer in command was a warlike operation. The master was out of his ordinary course of navigation where he would not have been in peace time.

Moreover had the *Matiana* not been torpedoed she would have got off the rocks and would not have become a total loss. The damage caused by the torpedo caused the loss.

R. A. Wright K.C. and *Claughton Scott* for the defendants, the marine risks underwriters. The loss of the *Matiana* was due to warlike operations, or, alternatively by the fact that she was torpedoed. The ordinary navigational rules were departed from simply for the purposes of defence. That was a warlike operation and not a marine risk, for the navigational risk was entirely different from that which it would have been in the ordinary course of seamanship. The loss was therefore a consequence of "hostilities or warlike operations." The German submarine campaign was in full operation and was a direct hostility. There was an imminent peril operating so near that the *Matiana* was within its area and was running away from it. Sailing with convoy is part of a scheme which is a warlike operation. If there was a miscalculation on the part of the master it was immaterial because he was not dominus. Whether the loss of the *Matiana* was caused by the torpedo striking her is a pure question of fact.

[*Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1) was referred to.]

Aspinall K.C. and *Raeburn* for the defendants, the Liverpool

(1) [1918] A. C. 350.

and London War Risks Insurance Association. The loss was due to a peril of the sea—namely, stranding upon the rocks. There was negligence or miscalculation on the part of the master. He was nine miles nearer the rocks than he thought. But whether he was negligent or not the loss was due to a marine risk. The *Matiana* was engaged in an ordinary operation of carrying a mercantile cargo from the one port to another. She was not engaged in hostilities or a warlike operation against the King's enemies. Sailing with convoy is not a warlike operation. It is an operation which takes place during war. The operation of carrying a mercantile cargo is not turned into a warlike operation by the fact that the *Matiana* was sailing with convoy. The question is what was the nature of the voyage upon which the *Matiana* was engaged. The loss was caused by the negligence of the officer commanding the convoy or of the master of the *Matiana* or of both. The master ought to have satisfied himself that he had safe water before him. Either his want of care or the currents were the cause of the loss. Even assuming that sailing with convoy was a warlike operation it was not the cause of the stranding of the vessel. She was out of her reckoning because the naval officer miscalculated his position. His miscalculation supervened between the warlike operation and the stranding. There was a clear intervening cause between the warlike operation, if there was one, and the stranding.

Mackinnon K.C. replied.

Cur. adv. vult.

Feb. 21. The following judgment was read by

BAILHACHE J. This case raises again the now familiar question whether the loss of a steamship is to fall on the marine or on the war risks underwriters. [The learned judge, having stated the facts, continued:] The marine risk underwriters say the loss of the *Matiana* was due to warlike operations. The war risk underwriters say the loss was due to a peril of the sea, namely, stranding upon the rocks. I agree with the war risks underwriters that the loss was due to stranding and that stranding is prima facie a marine peril, but as the marine

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policy contains the usual f.c. and s. clause I must go further and ascertain whether the stranding was due to warlike operations as the proximate and direct cause.

To sail with convoy is, in my opinion, a warlike operation. The assembling of the ships to be convoyed, and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen and the precautionary measures taken on the voyage must be taken together as all part of a warlike operation. In this case the vessels pursued a zigzag course, and were sailing at the time of the stranding through a submarine-infested area, and some 30 miles to the northward of the ordinary peace time course. The stranding happened in the course of this warlike operation, and, subject to another point made by the war risk underwriters, was directly due to it.

The other point they make is that the loss was not due to the warlike operation, but to the negligent way in which it was carried out by the Master of the *Matiana* or the King's officer in charge or of both. I incline to think that if the stranding was due to the master's negligence the point would be a good one.

In support of this charge they refer to the fact that the master has stated that he was nine miles north of his reckoning, and by that much nearer the rocks. I do not think there was any negligence in that under the circumstances. The vessels were zigzagging, the night was dark, the vessels were upon an unaccustomed course, and the currents were variable and of unknown direction and force.

Quite apart from these considerations I do not see that the master was in any way to blame for the position in which he found himself. He was one of four convoyed ships. He was under the orders of a King's officer, and was not responsible for the course taken. His business was to keep his position, relatively to the other three ships. A King's officer has given evidence. He has been in charge of convoys, and he tells me that a master must obey orders. He may signal if he thinks it needful for permission to execute any manœuvre of his own, and must wait until permission is given.

Moreover, at night, signalling by lights is not allowed. No doubt in the face of a sudden seen emergency a master would act on his own initiative, but there was none in this case. There were no lights upon the Keith Rocks and there were no breakers ahead. No negligence on the part of the master of the *Matiana* is proved.

I do not think negligence on the part of the King's officer would matter. The operation would still be a warlike operation although badly performed. As a fact I have no evidence of his negligence. True, the convoy was nearer the Keith Rocks than the master of the *Matiana* supposed, but whether that was because the King's officer was also out of his reckoning, or whether he ran the risk of the rocks to avoid some submarine danger known to him or in pursuance of some wireless message or warning, I know not, and negligence must be proved, not guessed. I do not forget that of the whole convoy the only ship to run upon the rocks was the *Matiana*. She might well have missed them, and having regard to the activities of submarines at the place and time in question I can easily suppose that the officer in charge took what appeared to him at the time to be the smaller risk.

In my judgment the negligence point fails and the loss of the *Matiana* falls upon the war risks policy.

Judgment for plaintiffs against defendants, the War Risks Association.

Judgment for defendants, the marine risks underwriters.

Solicitors for plaintiffs : *Waltons & Co.*

Solicitors for marine risks underwriters : *W. A. Crump & Son.*

Solicitors for War Risks Association : *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

J. E. A.

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Mar. 18, 24.

THE KING *v.* CHAMBERS.

Ex parte KLITZ.

Criminal Law—Conviction—Recognizance at Assizes—Breach—Removal of Recognizance into High Court.

Where a defendant has been convicted at the Assizes and has entered into a recognizance to keep the peace, the King's Bench Division can, on a breach of the recognizance being committed, by order, and without issuing a writ of certiorari, direct that the indictment and record of the trial be filed in the Crown Office in order that the defendant may be further dealt with.

The record having been filed in the Crown Office, the Court, being satisfied that a breach of recognizance had been committed, required the defendant to enter into a fresh recognizance to appear in the King's Bench Division if called upon.

MOTION on behalf of S. G. Klitz, calling upon O. M. Chambers to show cause why a writ of certiorari should not issue to remove into this court an indictment, conviction, and the recognizance entered into by him at the Surrey Assizes; why the recognizance should not be estreated; and why sentence should not be passed upon him.

Chambers was convicted at the Assizes, on March 1, 1919, of publishing a libel on Klitz, and was bound over to keep the peace towards Klitz, and to come up for judgment if called upon. He entered an appeal against that conviction. On March 4 he wrote a letter to Klitz, which, it was contended, was a repetition of the libel, and thus constituted a breach of the recognizance.

F. O. Robinson for the motion. In form the motion is for a rule nisi for a writ of certiorari, but it is not clear that a writ is necessary. In *Reg.* v. *Dudley and Stephens* (1) the Court held that as by s. 16 of the Judicature Act, 1873, the Courts of oyer and terminer and gaol delivery are made part of the High Court, the record of a case tried at the Assizes could be brought up by order, and that certiorari was not necessary. Since that decision, however, a writ of certiorari

(1) (1884) 14 Q. B. D. 273.

has been ordered to issue to bring up the record from the Assizes in the like circumstances (see *Reg.* v. *Brooke* (1) and *Rex* v. *Mul Lutchman* (2)), and in view of those later cases it was thought proper to proceed by motion for a rule.

DARLING J. In this case it is not necessary to grant a rule nisi for a writ of certiorari, as all that can be obtained by that procedure can be more conveniently achieved by means of the order we now propose to make. We order that the Clerk of Assize of the South Eastern Circuit and the Registrar of the Court of Criminal Appeal (an appeal to that Court having been entered) do file the indictment and record in the Crown Office, and that the defendant do attend in the King's Bench Division on Monday, March 24.

ROWLATT J. concurred.

The appeal to the Court of Criminal Appeal having subsequently been dismissed,

Mar. 24. The defendant Chambers appeared in the Divisional Court in obedience to the foregoing order, and on his undertaking not to repeat in any form the libellous statements, and on his entering into a new recognizance in the sum of 100*l.* to appear in this court if called upon, no further order was made, except that he pay the costs.

Solicitors for motion : *H. M. R. Pothecary, for Drummonds, Croydon.*

(1) (1894) 59 J. P. 6.
(2) (1909) *Times*, January 19 and March 25, 1909.

J. S. H.

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Mar. 24.

REX *v.* BARNETT.

Criminal Law—Removal of Indictment—Previous Trial at Assizes—"Expedient to the ends of justice"—Central Criminal Court Act, 1856 (19 & 20 *Vict. c.* 16), *s.* 3.

The Court has jurisdiction under s. 3 of the Central Criminal Court Act, 1856, to order the removal into the Central Criminal Court of an indictment for an offence committed outside the jurisdiction of that Court, if it is expedient to the ends of justice that the accused person shall be so tried, notwithstanding that an abortive trial has already taken place at the Assizes.

RULE NISI calling upon Maurice Barnett to show cause why he should not be tried at the Central Criminal Court for the offences for which he had been committed to take his trial at the next assizes at Norwich, and why a writ of certiorari should not issue to remove into the Central Criminal Court the indictments which had been found against him. The rule was moved on the ground that it was expedient that Maurice Barnett should be tried at the Central Criminal Court, and that a fair and impartial trial could not be had at the Norwich Assizes.

Barnett was in the employment of the Navy and Army Canteen Board as manager of a canteen at Norwich. Considerable quantities of stock disappeared from the canteen during his employment, and numerous false entries were made in the books kept by Barnett. He was charged under s. 1 of the Falsification of Accounts Act, 1875, with falsifying the accounts of the Navy and Army Canteen Board, and was tried before Lord Coleridge J. at Norwich Assizes in October, 1918, when it was admitted that he had falsified the books, but it was contended that he had not done so with any intent to defraud, but merely from a desire to make the books agree with the stock, there being a considerable deficiency in the stock arising from causes for which, according to the defence, Barnett was not responsible. The jury disagreed on the question whether there was any intent on the part of Barnett to defraud. Barnett was tried a second time

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at the Norwich Assizes in January, 1919, before Bailhache J., when the same defence was set up, and the jury again disagreed. The prosecution then applied for this rule under s. 3 of the Central Criminal Court Act, 1856 (1), alleging that prior to the second trial persons on the jury panel list were canvassed on behalf of Barnett, and that in view of that fact it was expedient to the ends of justice that Barnett should be tried at the Central Criminal Court and not at the Assizes. These allegations were denied on behalf of Barnett, but a copy of the jury list was produced in court by Barnett's solicitor, which besides being marked with a cross against the names of the twelve jurors who served, showed marks against fifteen out of the forty-eight names comprised in the jury list, and no explanation was given as to the reason why the marks were placed against the names of those particular persons.

Charles K.C. and *St. John Raikes* showed cause. It is true that this Court has in its discretion jurisdiction under s. 3 of the Central Criminal Court Act, 1856, to order that the trial of a person accused of an offence alleged to have been committed outside the jurisdiction of the Central Criminal Court shall take place at the Central Criminal Court if this Court considers that good ground has been shown for saying that a fair trial cannot be had at the Assizes. No good reason, however, has been shown in the present case for removing the trial from Norwich, the fact that the prosecution

(1) Central Criminal Court Act, 1856, s. 3: "Whenever any person shall have been committed or held to bail for any felony or misdemeanour committed or supposed to have been committed at any place out of the jurisdiction of the said Central Criminal Court, and it shall appear to the said Court of Queen's Bench . . . . that it is expedient to the ends of justice that such person should be tried for such offence at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench . . . . to order that such person shall be tried for such offence at the said Central Criminal Court, and thereupon a writ of certiorari shall be issued to the justices of oyer and terminer or of gaol delivery, or of the peace, before whom any indictment or inquisition charging such person with such offence shall then be pending, or before whom any such indictment shall thereafter be found, or to the coroner before whom any such inquisition shall have been or shall thereafter be taken, commanding them or him to certify and return such indictment or inquisition into the said Central Criminal Court."

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failed to secure a conviction and also that two juries disagreed as to their verdict is not a sufficient ground for removing the trial from Norwich to the Central Criminal Court.

[SHEARMAN J. It is expedient to the ends of justice that there should be either a conviction or an acquittal of an accused person, and the fact that two juries have disagreed as to their verdict is a matter to be taken into consideration.]

It may be that a disagreement of the jury is the proper result. Even if Barnett tried to canvass the persons on the jury list and to pervert the course of justice that is not a proper reason for removing the trial from Norwich, because if the case is removed to the Central Criminal Court he will still be able to pursue the same course of conduct. The question whether or not a case ought to be removed from the Assizes depends upon whether the number of persons available to serve as jurymen is so small that an impartial trial cannot be had. That ground however cannot be said to apply as regards Norwich, inasmuch as there are more than 20,000 persons on the jury list of that city.

[SHEARMAN J. Is there any reported case in which an application has been made to remove a case into the Central Criminal Court after an abortive trial has already taken place at the Assizes ?]

We have not been able to find a precedent for such an application as the present one. In any event it must be extremely rare.

Sir Ernest Wild K.C., *Sir Archibald Bodkin* and *F. Shewell Cooper* in support of the rule. Sect. 3 of the Central Criminal Court Act, 1856, is framed in very wide terms ; it gives power to the Court to remove a case into the Central Criminal Court if "it is expedient to the ends of justice" that the accused person should be tried there. The fact that there is no reported case in which an order has been made removing a case into the Central Criminal Court after a previous trial at the assizes is no reason why an order should not be made having regard to the wide terms of the section. The object of the application is not to obtain a conviction but to obtain a final decision one way or the other. Although the mere

fact that two juries disagreed is not a sufficient ground for removing the indictment yet different considerations apply when that fact is taken in conjunction with the fact that the jury on the second trial were canvassed on the accused's behalf, and that latter fact affords a probable reason for the second disagreement and shows that the probability is that a fair and impartial trial of the accused cannot be obtained at Norwich. In *Reg.* v. *Whittaker* (1) an indictment was removed from a court of quarter sessions for a borough into the High Court on the ground that a fair and impartial trial could not be had in the borough notwithstanding that the borough was a large one with a number of persons on the jury list.

SHEARMAN J. This is a case of considerable importance, as the application is one for which there is no precedent. The accused, Maurice Barnett, was charged with falsification of the accounts of his employers, the Navy and Army Canteen Board. He was tried in October, 1918, at the Norwich Assizes before Lord Coleridge J. and a jury. The case was simplified by the line of defence taken by the accused. The only thing in dispute was as to the proper inference which ought to be drawn from the admitted facts. In the result the jury disagreed. He was tried a second time at Norwich before Bailhache J. in January, 1919, when the same line of defence was again taken by the accused, the facts being admitted. The jury again disagreed. Subsequently inquiries were made by the prosecution, and as a result this rule was applied for. There was evidence that attempts had been made before the second trial to canvass the persons on the jury panel list. I use the word "canvass" because there is no suggestion that anyone was bribed. The suggestion that is made is that attempts were made in the city of Norwich to influence the sympathies of possible members of the jury in favour of Barnett and to suggest that it was a great hardship for him to be put upon his trial a second time. The details of the attempts are set out in the affidavits filed in support of the

(1) (1895) 59 J. P. 197.

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application, some of which are contradicted in the affidavits filed on behalf of Barnett. A document containing the jury panel list on the second trial has also been produced in court by the solicitor defending Barnett. This document contains the names of forty-eight persons summoned to serve on the jury on that occasion, more than 25 per cent. of whom have ticks put against them. It is sufficient to say that enough is disclosed in the affidavits and in the admissions that have been made and especially in the document produced by the solicitor defending Barnett to justify this application. It has in my opinion been proved that attempts were made to influence the sympathies of the jury at the second trial in favour of Barnett, and it may be that those attempts in fact contributed to the disagreement of the jury on that occasion.

This application to remove the indictment away from Norwich into the Central Criminal Court is made under s. 3 of the Central Criminal Court Act, 1856, which, dealing with the case of a person charged with an offence committed outside the jurisdiction of the Central Criminal Court, provides that if "it shall appear to the said Court of Queen's Bench . . . . that it is expedient to the ends of justice that such person should be tried for such offence at the said Central Criminal Court," then the Court of Queen's Bench may order the accused person to be tried at that court. The language of the section is framed in very wide terms, and in my opinion no attempt ought to be made to cut it down. The only thing that has to be considered by the Court is whether it is expedient to the ends of justice that the accused person should be tried for the alleged offence at the Central Criminal Court. It is expedient to the ends of justice that men who are guilty of the offences with which they are charged should be convicted, and that innocent persons should not be left in doubt. It is expedient to the ends of justice that a final decision should be arrived at. Without casting any reflection upon juries drawn from a city like Norwich I think they are very likely to have previously discussed a matter of such great local interest as the present case, and it would in my

opinion be placing too great a burden upon the jury if this case was tried for a third time at the Norwich Assizes, whereas if the case was removed to the Central Criminal Court the jury who would be sworn to try it would be drawn from a much wider district, and would be much more likely to arrive at a final decision than a jury drawn from the city of Norwich.

We have inquired whether there is any precedent for making such an order after an abortive trial has already taken place at the assizes, and we have been informed that there is no precedent for such an order. We however see no reason why such an order should not be made if it is expedient to the ends of justice that it should be made. In the present case I think it is expedient to the ends of justice that the order asked for should be made, and therefore the rule must be made absolute.

SALTER J. I am of the same opinion. No reported case has been cited in which such an application as the present has been made after an abortive trial at the assizes. I however see no reason why such an application cannot be successfully made. Sect. 3 of the Central Criminal Court Act, 1856, under which the application has been made, gives this Court a very wide discretion to order the trial of a person to take place at the Central Criminal Court for an offence committed at a place outside the jurisdiction of that Court, the only condition being that this Court deems it expedient to the ends of justice that the person should be tried for such offence at the Central Criminal Court. It is clearly expedient to the ends of justice that a final decision should be arrived at as to the guilt or innocence of the accused person. In the present case two juries have disagreed with regard to their verdict at Norwich. I do not think it is necessary to determine how much truth there is in the allegation that the jury at the second trial had been tampered with. It is sufficient to say that in my opinion if another trial of the accused man takes place at Norwich there will probably be another disagreement of the jury. I therefore think it is expedient to the ends of justice

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that the trial should be removed to the Central Criminal Court.

ROCHE J. I agree, and only desire to add in amplification of what has already been said that I should be loath to throw any doubt upon the fitness of provincial juries to try their own cases, or upon the advantage of their doing so, least of all do I desire to throw the slightest doubt upon the general fitness and impartiality of juries drawn from the city of Norwich. But even in a city of such substantial size and importance as Norwich it is by no means an easy task for a third jury to arrive unanimously at a definite conclusion after two previous disagreements by other juries which must inevitably be known to the third jury. I think a jury at the Central Criminal Court will be in much less difficulty in that respect. In these circumstances, having regard to the fact that in my opinion the accused or his friends made use of their local influence and knowledge to canvass the persons on the panel for the second jury, which conduct may well have contributed to the absence of agreement on the part of that jury, I think it is expedient in the interests of justice that the indictment of the accused should be removed to the Central Criminal Court, and that this rule should accordingly be made absolute.

Rule absolute.

Solicitors for accused: *Vizard, Oldham, Crowders & Cash, for Mills & Reeve, Norwich.*

Solicitors for prosecution: *T. F. Peacock, Fisher & Chavasse.*

R. F. S.

[IN THE COURT OF APPEAL.]

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COMMISSIONERS OF INLAND REVENUE *v.* MAXSE.

Revenue—Excess Profits Duty—Exception—Profession—Profits dependent on personal Qualifications—Proprietor of Magazine—Articles mostly written by himself—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 39.

The proper course when a trade or business liable to duty is carried on in connection with a trade or business not so liable is, as decided in *Inland Revenue Commissioners* v. *Ransom & Son* [1918] 2 K. B. 709, to sever the profits of the two businesses and assess accordingly.

M. purchased a monthly magazine for 1500*l.* and was the sole proprietor, editor and publisher thereof. The earnings were derived from sales of the magazine, from advertisements, and from reprints of articles mostly written by him. Before the war M. wrote a large part of each number, and, though some of the matter was contributed by others, the sales were largely due to the popularity of his own writings. When war broke out he increased his personal contributions and did most of the writing. At the present time he required practically no capital. Having been assessed to excess profits duty for the year ending May 31, 1915, he appealed to the General Income Tax Commissioners and contended that the profits were earned by reason of his personal qualifications, that the capital expenditure was small in comparison with the personal qualifications required to earn the profits, and that he was exempt from duty by virtue of para. (*c*) of s. 39 of the Finance (No. 2) Act, 1915. The General Commissioners having discharged the assessment, their decision was reversed by Sankey J., who held that M. was carrying on a commercial business and not a profession within para. (*c*), and therefore he was liable to duty:—

Held, by the Court of Appeal, that M. was carrying on the profession of a journalist, author or man of letters, and also the business of publishing his own periodical. The publishing business should be debited with a fair and reasonable allowance in respect of M.'s contributions, and a proper sum for his remuneration as editor, and on that footing he would be liable to duty in respect of his business, but exempt therefrom in respect of his profession.

Decision of Sankey J. [1918] 2 K. B. 715 reversed.

APPEAL from a decision of Sankey J. [1918] 2 K. B. 715 upon a case stated by the General Income Tax Commissioners for the division of St. Paul, Covent Garden, in the city of Westminster, on an appeal by the respondent (hereinafter called the appellant) against an assessment of 1000*l.* excess profits duty for the year ending May 31, 1915.

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In 1893 the appellant purchased the monthly magazine known as the *National Review* for 1500*l.*, and since then he had been the sole proprietor, editor and publisher. The assessment in question was on the profits of this publication.

The earnings were derived from sales of the magazine, from advertisements, and from reprints of articles which had practically all been written by the appellant. The outgoings included payments to contributors, cost of paper and printing, advertising, rent and office expenses. The appellant bought the paper, and had the magazine printed for him by an independent contractor. He employed a manager at 250*l.* a year, and two clerks, who did the advertisement canvassing and account keeping. The rent of the office was now 63*l.* a year. The distribution of the magazine was effected through wholesale houses.

Before the war the appellant wrote a large part of each monthly number, and, though some of the matter was contributed by others, the sales were largely due to the popularity of his own writings. When war broke out he greatly increased his personal contributions, and had since continued to do most of the writing. At the present time practically no capital was required for the carrying on of the magazine.

The appellant contended that the profits were earned by him by reason of his personal qualifications, that the capital which he had expended was insignificant in comparison with the personal qualifications required to earn the profits, and that he was exempt from excess profits duty by virtue of para. (*c*) of s. 39 of the Finance (No. 2) Act, 1915. (1)

It was contended for the Crown that the income derived

(1) The Finance (No. 2) Act, 1915, s. 39: "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting . . . . (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount. . . . ."

from publishing a magazine was derived primarily from the sale of a commodity, and that the appellant was carrying on a business liable to the duty, as he was not merely a journalist contributing to the Press.

The General Commissioners held that the appellant was exempt from the duty, and they discharged the assessment.

On appeal from that decision Sankey J. held that as the appellant was not in the position of an ordinary journalist receiving remuneration for articles contributed to the Press, but derived his profits from the sale of a commodity and was carrying on an ordinary commercial business, there was no evidence that he was carrying on a profession within s. 39 (*c*) of the Finance (No. 2) Act, 1915, and therefore he was liable to pay excess profits duty. The appellant appealed.

Hon. W. Finlay K.C. and *A. M. Latter* for the appellant. The question is whether the appellant is carrying on a profession the profits of which are dependent mainly on his personal qualifications, or whether he is carrying on a trade or business.

[SWINFEN EADY M.R. May he not be carrying on both ?] The profits in that case would be severable. The question whether he is carrying on a business or a profession is one of degree.

[SWINFEN EADY M.R. Is not the proper way to treat the case to ascertain what are his profits as a trader and what as a journalist ?]

The submission is that looking at the undertaking as a whole the profits are the result of the work of the appellant's brains. We are content however that the accounts should be submitted to the Commissioners.

[They were stopped by the Court.]

Sir E. Pollock S.-G. and *Parr* for the Crown. We are bound by the provisions of the statute. Sect. 40 would not permit of the suggested separation of profits. The profits must be determined on the same principles as for the purpose of income tax.

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[SWINFEN EADY M.R. If the profits of the business cannot be severed from those of the profession can the Crown get anything? To tax the professional earnings is not authorized by the statute.]

What the appellant carries on is the business of publishing the magazine. The profits arise from the sales, but largely from advertisements. A considerable sum is paid to contributors other than the appellant. If the business were sold it might be successfully carried on without the appellant's assistance. It cannot therefore be said that it is mainly dependent on his personal qualifications.

[SWINFEN EADY M.R. The word "profession" has received a progressively extended meaning. See "The Oxford Dictionary."]

The same question has arisen with regard to the profession of a schoolmaster: *Inland Revenue Commissioners* v. *North and Ingram.* (1)

[SWINFEN EADY M.R. In *Inland Revenue Commissioners* v. *Ransom & Son* (2) there was a severance of the profits of two businesses, one of which was exempted from the tax.]

It was possible in that case The materials for it were in existence.

[SWINFEN EADY M.R. So here. Is it not a question of fact?]

The appellant has not treated himself as a contributor. He is remunerated by the profits of the business which he carries on. The real question is, are the profits derived from the exercise of a profession or the carrying on of a business? This is a commercial business rather than a profession.

Hon. W. Finlay K.C. in reply. It was for the Commissioners to decide whether the profits were the result of a business or were due to the professional writings of the appellant. It cannot be that the method of remuneration results in turning what is really the exercise of a profession into a trade. There is no point of law on which Sankey J. could properly find that the Commissioners were wrong in deciding the case as they did.

Cur. adv. vult.

(1) [1918] 2 K. B. 705. (2) Ibid. 709.

Mar. 26. SWINFEN EADY M.R. This is an appeal by Mr. Maxse from the judgment of Mr. Justice Sankey upon a case stated by the General Income Tax Commissioners for St. Paul, Covent Garden, and it raises a question as to the liability of the appellant for excess profits duty.

In 1893 the appellant purchased for 1500*l.* the *National Review*, a monthly magazine, and has since been sole proprietor, editor and publisher of it. He buys the paper, and has the magazine printed for him. He employs a manager at a salary of 250*l.* a year and two clerks who do the advertisement canvassing and account keeping. The yearly rent of the office is 63*l.* and the distribution of the periodical is effected through wholesale houses.

Before the war the appellant wrote personally a large part of each monthly number, but the bulk of the matter was contributed by other writers, whom the appellant paid for their contributions. The sales of the magazine were largely due to the popularity of the appellant's own writings. Since the war the appellant has largely increased the proportion of his own contributions contained in each number, which now consists mostly of his own writings. The figures given in the case show that the magazine has a considerable sale, and that some of the income is derived from advertisements.

Mr. Maxse contends that he is not liable to excess profits duty on the ground that he carries on the profession of journalism, and that he falls within the exception (*c*) in s. 39 of the Finance Act. On the other hand it is contended by the Inland Revenue Commissioners that Mr. Maxse carries on the business of publishing the *National Review*, deriving profits from the sale of it to the public, and is in quite a different position from a journalist who is paid for his contributions, and is not interested in the profits of the periodical in which his writings are published.

It must be borne in mind that the appeal from the Income Tax Commissioners only lies upon a point of law, and that the decision of the Commissioners upon the facts is final, assuming that there is evidence upon which they might come to the conclusions at which they have arrived. The Income

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Tax Commissioners held that Mr. Maxse was exempt from assessment to excess profits duty and discharged the assessment. This involves a finding :—

(1.) That the business carried on by Mr. Maxse was the profession of journalism.

(2.) That the profits of it were dependent mainly on the personal qualifications of the person by whom the profession was carried on.

(3.) That the profession was one in which no capital expenditure was required or only capital expenditure of a comparatively small amount.

Mr. Justice Sankey pointed out that findings (2.) and (3.) were findings of fact which could not be disturbed, and no question was raised before us on these findings. The learned judge then pointed out that the real question was whether there was any evidence upon which the Tax Commissioners could find that Mr. Maxse was carrying on a profession, and he held that it could not be said in law that a man who publishes a magazine was carrying on a profession, and on this ground he reversed the decision of the Income Tax Commissioners. He added that he saw the difference between a journalist who sent in articles for which he was paid by the proprietors or publishers, as to which he would have no doubt that a person who carried on that occupation was carrying on a profession, and a person who was only remunerated for his articles by the sale of a commodity in the open market.

In my opinion Mr. Maxse is carrying on the profession of a journalist, author or man of letters by writing numerous articles which are published monthly and also by editing the magazine, from which he derives pecuniary profit. An author would not cease to be such if he published or procured to be published his own works at his own expense, and looked only for his remuneration to the sale of a commodity (to wit his books) in the open market. (1) The truth is that Mr. Maxse is a journalist and editor, and is also carrying on the business of publishing a magazine, but the fact that he is a

(1) This is in fact not an uncommon mode of publishing.

publisher does not prevent him from also exercising the profession of a journalist.

Part III. of the Finance Act applies to the trade or business of a publisher, and the profits arising from this trade or business are to be "separately determined for the purpose of this part of the Act," and are to be determined on the same principles as the profits and gains of a business would be determined for the purpose of income tax, subject to the statutory modifications.

The profits of exercising the profession of a journalist are excepted by s. 39 (*c*), and the Finance Act does not impose any excess profits duty upon them, and therefore such duty cannot be levied upon them, and the direction about determining gains and profits upon the same principles as for the purpose of income tax has no application to profits arising from the profession of a journalist. The proper course to be followed where a trade or business liable to the duty is carried on in connection with a trade or business not so liable was decided by Mr. Justice Sankey in *Inland Revenue Commissioners* v. *Ransom & Son.* (1) Where it is possible to separate one business from the other, so as fairly to arrive at the separate profits of the taxable business, this should be done, and there is nothing in law to prevent it being done. In that case the business of husbandry, including medicinal herb growing, was carried on in connection with a business of manufacturing chemists and the farm supplied herbs to the chemical factory. One of the directors kept memoranda of the value of the produce transferred to the factory. So that there was no difficulty in ascertaining what amount should be debited to the factory and credited to the farm for herbs supplied, and in excluding the profits of the farm for the purpose of the excess profits duty.

So in the present case the amount of the written contributions of Mr. Maxse has already been ascertained. The business of publishing the magazine should be debited with a fair and reasonable sum by way of allowance to Mr. Maxse for his contributions, in the same way as payments to outside

(1) [1918] 2 K. B. 709.

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contributors are dealt with; also with a proper sum for remuneration as editor. In that manner the professional journalist is paid for his professional services, and without excess profits taxation, and the business of publishing the magazine can be assessed to the excess profits duty in respect of profits properly attributable to the publishing business.

Mr. Maxse's counsel at an early stage of the case said that his client was perfectly satisfied with this procedure, but the Solicitor-General opposed it; nevertheless I am satisfied that it is the only method of fairly giving effect to the statute. The difficulty of separating the profits of two businesses is largely one of fact, and in my opinion, for the reasons I have given, it can be done readily in the present case.

The appeal should be allowed and the order of the Court below discharged, and a declaration made that the profits of the publishing business ought to be separately assessed after debiting a proper sum for Mr. Maxse's personal contributions and his work as editor.

Each party is to bear his own costs of the application to the Court below and any costs already paid under that order to be returned. The appellant to have his costs of this appeal against the Inland Revenue Commissioners.

WARRINGTON L.J. In holding as they did it is clear that the Commissioners must have found that the profits in question had arisen (1.) from a "profession," (2.) that the profits of such profession are dependent mainly on the personal qualifications of the person by whom the "profession" is carried on, and (3.) that no capital expenditure is required, or only capital expenditure of a comparatively small amount, so as to bring the appellant within the exception (*c*) in s. 39 of the Finance (No. 2) Act, 1915. Mr. Justice Sankey has held that there was evidence justifying the findings numbered (2.) and (3.) above on the personal qualifications of the appellant, but that there was no evidence sufficient to support the finding numbered (1.).

The profits in question arose during the year ending 31st of May, 1915, from the publication of the *National Review*,

of which the appellant is the sole proprietor, editor and publisher. He purchased the *National Review* in the year 1893 for the sum of 1500*l*. From 1893 to 1905 the publication resulted in a loss—since that date profits have been made each year. Before the outbreak of the war a large part of each monthly number was written by the appellant himself, but the bulk of the matter was contributed by others who were paid by the appellant, such payments being treated as part of the expenses of publication. Since the outbreak of war, with a view to economy, the appellant has greatly increased his personal contributions, and during the period in question did most of the writing. The sale of the review has been largely increased by the popularity of the appellant's own writing. A portion of the revenue is derived from advertisements.

It is conceded that the profits made by the owner of a magazine or journal from the publication thereof, the owner taking no part in the literary work, would be profits arising from a trade or business and would not be within exception (*c*) of s. 39. It is conceded on the other hand that profits made by a writer would be profits arising from a "profession," and in my opinion this would be so whether those profits consist of remuneration received by him from another person or whether they are derived from the sale of his works by the writer himself, or from their publication and sale through another person as publisher, who either pays the author a royalty or a proportion of the profits arising from the publication and sale. The remuneration of an editor of a magazine or a journal would also, in my opinion, be profits arising from a profession.

The result of the order of Mr. Justice Sankey is to charge the appellant on profits arising from his work as an author and editor as well as on those arising from the publication of the magazine in its commercial aspect. This in my opinion is wrong, and the order must be set aside. But it does not follow that the appellant is wholly exempt from duty. The truth is that his profits are derived from two businesses, one of which is a profession such as is described in exception (*c*)

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Warrington L.J.

and the other of which is not, and in order to arrive at the true result the latter ought to be separately determined as provided by s. 41 of the Act.

This course was suggested by the Court at an early stage of the argument and was accepted as satisfactory by the appellant. The Solicitor-General however contended that there would be a difficulty in the way of this owing to the reference to income tax in s. 41. With all respect to the Solicitor-General I fail to see any difficulty. The only profits to be determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax are the gains and profits arising from a trade or business to which Part III. of the Act applies and do not include what I may call the appellant's professional profits. An example of the application of the principle of the separation of excepted profits from those liable to duty is found in *Inland Revenue Commissioners* v. *Ransom & Son.* (1)

So far as the working out of the principle is concerned I see no difficulty in ascertaining what would be a reasonable sum to allow to the appellant for the literary work contributed to the magazine and for his remuneration as editor. This would then be treated as one of the expenses of the commercial side of the business and the profits of that side would be pro tanto reduced. The sum so allowed would be profits arising from a profession and would be free from charge.

I think the appeal must be allowed and an order made as proposed by the Master of the Rolls.

SCRUTTON L.J. I need not repeat the facts found in the special case and referred to by my brothers. Some of the facts found in the case, however interesting to the biographer of Mr. Maxse or historian of his country, appear to have no legal relevance to this appeal.

Excess profits duty under ss. 38 and 39 of the Finance Act (No. 2), 1915, is to be levied on "all trades and businesses" with certain exceptions. The exceptions include "employments" and certain "professions." The profits are to be

(1) [1918] 2 K. B. 709.

determined on the same principles as "trades or businesses" under the income tax, except as expressly modified by the Finance Act. "Trades" under Schedule (D) of the Income Tax Acts are part of a group described as "trades professions employments or vocations." The word "businesses" is not used in Schedule (D). When one considers that by the Finance Act "professions" and "employments" are expressly excepted from taxation on "trades and businesses," the inference is irresistible that Parliament is using the word "businesses" to cover the "professions, employments and vocations" of Schedule (D). If they were not included by the words "trades or businesses" there would be no need to except them.

The next question is what is a "profession"? I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a "profession" in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word "profession" used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning. It appears to me clear that a journalist whose contributions have any literary form, as distinguished from a reporter, exercises a "profession"; and that the editor of a periodical comes in the same category. It seems to me equally clear that the proprietor of a newspaper or periodical, controlling the printing, publishing and advertising, but not responsible for the selection of the literary or artistic contents, does not exercise a "profession" but a trade or business other than a profession. What then is to be done if the same man is both proprietor, editor and contributor? In my view

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it can always be determined as a question of fact what is his reasonable remuneration as contributor, having regard to the scale of payment by the periodical, and its sales; or as an editor having regard to the existing and ordinary remuneration of such people. The question must be approached with care; no fictitious or artificial operations must be allowed to evade excess profits duty (s. 44 (3.)), though this would not in my view cover the fixing of reasonable remuneration for work done. And in fixing a reasonable standard of remuneration for a contributor it must be considered whether the rate fixed would involve the paper being carried on at a continuous loss if that rate were paid, and whether the available profits should not be reasonably divided between proprietor, editor and contributor, and the profits of the latter two excluded from excess profits tax. It would not be a fair decision to fix a reasonable remuneration for capital and services provided by the proprietor, without regard to the total fund available, and let the editor and contributor take the remainder if any. Nor would it in my opinion be fair to fix the reasonable remuneration for the contributor and editor, without regard to the total fund available, and let the proprietor take the remainder if any. An authority for this severance is found in *Inland Revenue Commissioners* v. *Ransom & Son* (1) where a chemical manufactory had as an ancillary a farm for the growth of herbs. Though the company's accounts did not distinguish the two profits, materials existed from which the profits of the farm could be computed and exempted from the tax as profits of "husbandry."

Applying these principles to the present case, Mr. Maxse is exercising the profession of a journalist and of an editor, a profession the profits of which are dependent mainly on his personal qualifications and in which only small capital expenditure is required. These two facts are found by the Commissioners in his favour. He is also carrying on the business of proprietor of a review, with a manager and clerks, and derives revenue from advertisements and the sale of the magazine after paying the expenses of its production, which

(1) [1918] 2 K. B. 709.

would include remuneration for editor and contributor. The Commissioners have treated him as not liable for any excess profits, the judge below as liable for excess profits on the whole combined business. Neither view is in my opinion correct. He is liable on his excess profits as proprietor, excluding his reasonable remuneration as editor and contributor, assessed with due regard to the fact that if they were so fixed as to leave no remuneration for the proprietor no independent proprietor would carry the magazine on. In my view the order of the judge should be discharged, and a declaration made in the terms stated by the Master of the Rolls, which will be substituted for the determination of the General Commissioners that the appellant is exempt from assessment to excess profits duty.

SWINFEN EADY M.R. Of course the effect of the judgment in the form that I have indicated will be that the direction of the Commissioners that the assessment be discharged will stand although the ground which they give, that the appellant was exempt from assessment to excess profits duty, is modified by our judgment. By discharging the order below which discharged the order of the Commissioners we restore the order of the Commissioners as regards the result of the assessment.

Appeal allowed.

Solicitors for appellant: *Preston & Foster.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

G. A. S.

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[IN THE COURT OF APPEAL.]

T. A. RUF & COMPANY, LIMITED *v.* PAUWELS.

Practice—Leave to appeal—Setting aside an Award—"Judge"—Divisional Court—Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*b*).

By s. 1, sub-s. 1, of the Judicature (Procedure) Act, 1894, "No appeal shall lie . . . . (*b*) without the leave of the judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge" except in certain cases:—

Held, that "judge" meant a judge sitting alone, and did not include a Divisional Court, and therefore leave to appeal was not necessary in the case of an appeal from an order of a Divisional Court setting aside an award in an arbitration on the ground of error of law appearing on its face.

"Contract in writing" discussed.

APPEAL from an order of a Divisional Court setting aside an award.

By a contract dated February 28, 1918, Alphonse Pauwels (herein called the respondent) sold to T. A. Ruf & Co., Ltd. (herein called the appellants), a quantity of soap. The terms of the contract were contained in a sold note signed by the respondent. At the foot of the sold note were these words :—"P.S.—Please confirm the above." The note also contained a clause providing that "any dispute on the contract or any question arising thereout to be settled by arbitration herein, in the usual manner. . . . ." A dispute arose under the contract as to non-delivery of part of the soap and was referred to arbitration, and the arbitrators made an award in favour of the appellants. The award contained a recital that "by a contract in writing made by Alphonse Pauwels with T. A. Ruf & Co., Ld., dated the 28th day of February, 1918, Alphonse Pauwels contracted to sell and deliver" a certain quantity of soap to the appellants at a certain price, and that a dispute had arisen which was referred to arbitration; it contained an adjudication of that dispute in favour of the appellants; and it concluded as follows :—"We award and determine that T. A. Ruf & Co., Ld., are to pay the costs of the reference,

arbitration and award, including 36*l.* 15*s.* our fees and expenses in regard to the said arbitration, as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute."

The respondent moved in the Divisional Court to set aside the award on the ground that it " is bad in law and shows error on its face and shows further that there was no legal contract binding on the parties."

The Divisional Court ordered the award to be set aside upon the ground that on the face of the award the arbitrators had treated as a contract in writing binding upon both parties that which was signed by one of the parties only and was therefore not a contract in writing.

The appellants appealed. No leave to appeal was applied for or obtained. The preliminary objection was taken that no appeal lay without leave.

Patrick Hastings for the appellants. Leave to appeal is not necessary. It may be admitted that this is an interlocutory appeal: *In re Croasdell and Cammell, Laird & Co.* (1) But it does not follow that leave to appeal is necessary. By s. 45 of the Judicature Act, 1873, in the case of appeals from inferior Courts to the Divisional Court leave to appeal from the determination of the Divisional Court is necessary. Sect. 8 of the Judicature Act, 1884, extended the provisions of that section to appeals from an award or certificate of a referee or arbitrator in a compulsory reference to arbitration in any cause or matter in the Queen's Bench Division. The Judicature (Procedure) Act, 1894, is the important statute. Sect. 1, sub-s. 5, only applies where the Divisional Court sits as a Court of Appeal from any Court or person. It " has reference to appeals from inferior Courts, and does not apply to an appeal from a judgment or order of the High Court itself ": *Wynne-Finch* v. *Chaytor*. (2) It does not apply where, as here, the Divisional Court is acting in its original jurisdiction. The application to the Divisional Court (s. 11 of the Arbitration Act, 1889) was not an " appeal." Nor does s. 1, sub-s. 1 (*b*),

(1) [1906] 2 K. B. 569. (2) [1903] 2 Ch. 475, 485.

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of the Act apply. (1) It only applies to an order of a judge. "Judge" means a judge sitting alone, as in s. 1, sub-s. 3, and does not include a Divisional Court. In the expression "the Court or a judge" Court is contrasted with judge, the latter word meaning a judge sitting in chambers. See Annual Practice, 1918, vol. ii., pp. 1905, 1906. [The Annual Practice, 1918, vol. ii., p. 2201, and the Yearly Practice, 1917, vol. ii., p. 1633, were also referred to.]

Casswell (*Jowitt* with him) for the respondent. It is not contended that s. 1, sub-s. 5, of the Judicature (Procedure) Act, 1894, is applicable. But s. 1, sub-s. 1 (*b*), applies, and leave to appeal is necessary. The order of the Divisional Court is an interlocutory order (*In re Croasdell and Cammell, Laird & Co.* (2)), and "judge" includes Court. The order setting aside the award is an interlocutory order of a "judge." There is no reason why greater finality should be given to an order of a judge of the Chancery Division setting aside an award than to an order of a Divisional Court composed of two or more judges. The Court should be slow to give a construction to the sub-section having that result.

[The Court said that they would consider their judgment on this point, but would hear the case on the merits.]

Patrick Hastings for the appellants. It may be that under s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), the contract must have been assented to in writing by both parties: *In re New Eberhardt Co.* (3) But there the words were "contract duly made in writing." See also *Firmstone's Case.* (4)

[Duke L.J. "An agreement in writing" within s. 4 of the Attorney and Solicitors Act, 1870 (33 & 34 Vict. c. 28), need be signed by the client only: *In re Thompson* (5); *In re Jones.* (6)]

There may be a "contract in writing" where one party

(1) Sect. 1, sub-s. 1, of the Judicature (Procedure) Act, 1894: "No appeal shall lie . . . . (*b*) without the leave of the judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge, except in the following cases. . . . ."

(2) [1906] 2 K. B. 569.

(3) (1889) 43 Ch. D. 118.

(4) (1875) L. R. 20 Eq. 524.

(5) [1894] 1 Q. B. 462.

(6) [1895] 2 Ch. 719.

accepts by parol. Under s. 4 of the Statute of Frauds (29 Car. 2, c. 3) the agreement or a memorandum or note thereof need only be signed by the party to be charged. But however this may be, if awards of commercial arbitrators are to be scrutinized so closely as this award, commercial arbitrations will be rendered futile.

Jowitt (*Casswell* with him) for the respondent. There is error of law apparent on the face of the award. A "contract in writing" must be one assented to by both parties in writing: *In re New Eberhardt Co.* (1); *Pooley* v. *Driver*. (2) It is not suggested that a mere inaccuracy of expression will vitiate an award. The objection to the award has substance in it. The arbitrators may not have applied their minds to the question whether the appellants ever either in writing or verbally accepted the written offer at all. But in the special circumstances of this case a verbal acceptance would not be sufficient. The request "please confirm the above" meant confirm in writing. The affidavits show that the offer was never accepted even if an acceptance not in writing would be sufficient.

Cur. adv. vult.

March 14. Bankes L.J. read the following judgment:— This is an appeal from a Divisional Court setting aside an award on the ground that it was bad in law and for error apparent on its face. A preliminary objection was taken that no appeal lay from the decision without leave, and that no leave had been either applied for or obtained. The point is one of some practical importance, and as the various books of practice deal with the question as one upon which there may be some doubt we took time to consider our judgment.

The application to set the award aside was made under s. 11 of the Arbitration Act, 1889, which provides that under certain circumstances the Court may set aside an award. "Court" is defined in that statute as meaning "Her Majesty's High Court of Justice." The practice is well established that an application under the section must in the King's Bench

(1) (1889) 43 Ch. D. 118. (2) (1876) 5 Ch. D. 458.

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Division be made to a Divisional Court and in the Chancery Division to the judge in court. The policy of the Judicature Acts has undoubtedly been to curtail the right of appeal from a decision of a Divisional Court without leave. Sect. 45 of the Judicature Act, 1873, provides that no appeal shall lie without special leave from the decision of a Divisional Court on an appeal from petty or quarter sessions or from any other inferior Court. Sect. 8 of the Judicature Act, 1884, extended the provisions of s. 45 of the Act of 1873 to all appeals from any award or certificate of an arbitrator where there had been a compulsory reference to arbitration in any cause or matter in the Queen's Bench Division of the High Court. Sub-s. 5 of s. 1 of the Judicature (Procedure) Act, 1894, made further provision restricting the right of appeal without leave from a Divisional Court. The language of this sub-section is very wide, but it has received judicial interpretation by the full Court of Appeal in *Wynne-Finch* v. *Chaytor*. (1) In that case an action in the Chancery Division had been referred to an official referee for trial, and judgment had been entered in pursuance of his direction. The first question which the Court had to decide was whether an appeal from that judgment lay to the Court of Appeal, or whether an application to set aside the judgment should be made to the judge of the Chancery Division to whom the action was assigned. The Court decided that the latter course was the proper one to follow. The other question in the case was whether sub-s. 5 of s. 1 of the Act of 1894 applied. The Court decided that it did not, upon the ground as expressed at p. 485 of the judgment that "this clause of the Judicature Act, 1894, has reference to appeals from inferior Courts, and does not apply to an appeal from a judgment or order of the High Court itself." The editors of the various books of practice point out that this decision apparently covers a case like the present where the decision is a decision of the High Court itself, although the application to the Divisional Court is in the nature of an appeal to the High Court from a decision of an arbitrator. In my opinion the decision in the case of *Wynne-Finch* v. *Chaytor* (1) covers

(1) [1903] 2 Ch. 475.

the present case. Indeed, I think that the respondent's counsel did not really contest this point. It was, however, contended that the decision of the Divisional Court was an interlocutory order or judgment within sub-s. 1 (*b*) of s. 1 of that statute, and that as a consequence no appeal lay to this Court without leave. To this it was replied that the sub-section only applies to orders or judgments made or given by a judge : and that this expression does not include a Divisional Court. The Interpretation Act, 1889, was appealed to in answer to this objection, and it was pointed out that to accept the contention would not only be to decide against the general policy of the Judicature Acts in reference to appeals without leave, but that it would result in leave being necessary where an award had been set aside by a Chancery judge, but unnecessary where it had been set aside by a Divisional Court. I quite accept the force of this argument, but it is not, in my opinion, possible to deal with what may very possibly be a casus omissus by giving to the expression " a judge " a more extended meaning than that which has been the accepted meaning of the expression when used in the Judicature Acts where not otherwise provided, or a different meaning than that which it obviously bears in sub-s. 3 of the same section. As matters stand at present no leave to appeal is, in my opinion, necessary from a decision of a Divisional Court setting aside an award. The preliminary point taken by the respondent therefore fails.

Upon the merits the appeal in my opinion succeeds. The point taken before the Divisional Court was a short one, and a curious one. The award commenced with a recital that by "a contract in writing " between the parties the one had agreed to sell and the other to buy a quantity of soap. The award then proceeded to adjudicate upon the dispute between the parties in reference to the non-delivery of the agreed quantity of soap, and it concluded as follows :—" We award and determine that T. A. Ruf & Co., Ld., are to pay the costs of the reference, arbitration and award . . . . as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute." The case made in the Divisional Court was that the award was bad upon its face in that it

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recited the existence of a contract in writing and at the same time indicated that it was signed by one only of the parties, and that to constitute a contract in writing it was necessary in law that it should be signed by both parties. Reference was made to a number of cases, such as *In re New Eberhardt Co.* (1), where the Court had to decide whether an agreement signed by one party only constituted a " contract duly made in writing " within the meaning of s. 25 of the Companies Act, 1867. In my opinion these decisions are of no real assistance in the present case, as there are just as many decisions to be found where the Courts have decided that the signature of one party only is sufficient to satisfy the requirements of some particular statute as there are decisions that the signatures of both parties are necessary to satisfy the requirements of some other statute. As instances of the former class of case I may mention *Bake* v. *French* (2) and *In re Jones* (3), decisions upon s. 4 of the Solicitors Act, 1870, which requires " an agreement in writing " between the solicitor and the client. In my opinion it is not possible to discover upon the face of this award any error in law which would justify the Court in setting it aside. Mr. Jowitt for the respondent felt himself obliged to admit that if all he could rely upon was mere inaccuracy of expression he could not hope to succeed; but he suggested that he could by affidavit evidence establish that his client was right in his contention that the appellants had never accepted his written offer, and consequently that what might otherwise be a mere inaccuracy of expression became a fundamental mistake in law. In my opinion it was not open to the Divisional Court to go into a question which was one entirely for the arbitrators. The Court, however, upon the materials before it as contained in the affidavits filed on behalf of the respondent, appears to have taken a strong view in his favour upon the merits. Those affidavits have now been answered, and had the Divisional Court had the materials before them which were before this Court, they would probably not have come to the conclusion at which they did arrive upon the merits.

(1) 43 Ch. D. 118. (2) [1907] 2 Ch. 215.
(3) [1895] 2 Ch. 719.

In my opinion, however, the merits of the dispute between the parties cannot be taken into consideration for the purpose of coming to a decision upon the language of the award. I think that it is making almost too generous a concession in the respondent's favour to admit that the arbitrators have used inaccurate language when they describe the sold note signed by the respondent, and which apparently they came to the conclusion was accepted verbally or by conduct on the part of the appellants, as a contract in writing between the parties, but assuming an inaccuracy of expression it is in my opinion not possible to set an award aside merely because of such an inaccuracy of expression as is here complained of. In my opinion the appeal succeeds and must be allowed with costs.

Warrington L.J. read the following judgment:—This is an appeal from an order of a Divisional Court of the King's Bench Division setting aside an award as being bad on the face of it. It was assumed that such an order is interlocutory: *In re Croasdell and Cammell, Laird & Co.* (1) A preliminary objection was taken that leave to appeal was necessary and was not obtained. To this it was replied that the order having been made by a Divisional Court and not by a judge sitting alone leave to appeal was not necessary.

The question turns on the true construction of s. 1, sub-s. 1 (*b*), of the Judicature (Procedure) Act, 1894: "No appeal shall lie without the leave of the judge, or the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge," except in certain cases amongst which such a case as the present is not included. I think the language of the sub-section indicates that what is contemplated is an order of a judge sitting alone and exercising the jurisdiction of the High Court pursuant to s. 39 of the Judicature Act, 1873. The expression "the Court or a judge" is a familiar expression to those who have to consider rules of practice and procedure, and I think effect must be given to the use in the section in question of the less comprehensive expression "a judge." Moreover, the leave required is that of "the

(1) [1906] 2 K. B. 569.

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judge," rather strongly indicating that the provision is confined to orders made by a single judge. It is quite true that this construction gives rise to the curious anomaly that in the case of orders made in the Chancery Division by a single judge leave would be required, whereas precisely similar orders made by a Divisional Court in the King's Bench Division would be appealable without leave, a greater degree of finality being thus conferred upon the former class of orders than upon the latter. But in my judgment the words are strong enough to require the natural meaning to be given to them, although the anomaly I have referred to is thereby revealed. The order therefore was appealable without leave.

On the merits I am of opinion that the appeal ought to succeed. The ground on which the Divisional Court has set aside the award is that the arbitrators have treated as a contract in writing that which the award on the face of it shows was not a contract in writing. The transaction in question was an alleged sale by Pauwels to Ruf & Co. of 100 tons of soap of a certain quality and at a certain price. The terms of the sale were expressed in a sold note signed by Pauwels with a postscript "Please confirm the above." Written confirmation was not sent, but the arbitrators state that they heard evidence, and it may well be that they came to the conclusion that there was a parol acceptance by Ruf & Co. of the terms of the sold note. In fact, I should myself draw this inference from the correspondence. Then the arbitrators begin their award by reciting that by a contract in writing Pauwels contracted to sell the goods and it was provided that disputes should be settled by arbitration. They then mention their appointment and the proceedings at the arbitration and make an award in favour of Ruf & Co., but they conclude by awarding that they pay the costs "as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute." In my opinion these last words are not really contradictory of the recital. Taken in conjunction with the rest of the award they seem to me to indicate that the arbitrators found that Ruf & Co. had confirmed the contract though not in writing,

and if so they may quite properly refer to the contract as a "contract in writing," although the memorandum of it was signed by one party only. I think the appeal succeeds and the award ought to stand.

Duke L.J. read the following judgment:—The appellants have in my opinion a right of appeal to this Court from the decision of the Divisional Court which is the subject of their appeal. It is not disputed that there is such a right of appeal if the case is outside the operation of the Judicature (Procedure) Act, 1894, s. 1, sub-s. 1 (*b*). That statute enacts that except in certain specified cases no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by "a judge"; and the respondent contends that the order in question is such an order. In my opinion an order of a Divisional Court is not an order given by a judge within the meaning of the section. The Act in question is by s. 7 thereof directed to be read with the Judicature Acts, 1873 to 1891, in which orders of a Court and orders of a judge are systematically treated as distinct classes of orders. It is not necessary to consider whether the order in question is final or interlocutory.

The award which the Divisional Court has ordered to be set aside is said by the respondent and has been held by the Divisional Court to be bad in law on the face of it. The award recites and so by implication declares the existence of a contract between the respondent and the appellants, that is to say, a contract in writing made February 28, 1918, whereby the respondent contracted to sell soap to the appellants, finds a breach by the respondent, and awards damages to the appellants, but directs payment of costs by the appellants on the ground that "their conduct in not confirming in writing the contract was probably the cause of the dispute." In the view of the Divisional Court this reference to the conduct of the appellants with regard to their obligations toward the respondent amounts to a declaration that there was not, in fact, any concluded contract, or at any rate that there was not a contract in writing. A contract in writing, it is said, does not

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need to be confirmed. Holding this opinion with regard to the meaning of the award, the Divisional Court has proceeded upon affidavit evidence filed by the respondent to consider whether the arbitrators were right in holding that there was a contract between the parties for breach of which damages might be awarded. In my opinion there is no inevitable discrepancy between the recital in the award of a contract in writing and the ground which the arbitrators state for the order they made as to costs. It may well be that they thought the appellants had behaved unreasonably as business men in refusing some demand or request with which they were not bound in law to comply. As to the suggestion which was made that the words "contract in writing" import a contract made by means of a writing or writings signed by both parties, I do not think the words necessarily have that meaning. A document purporting to be an agreement may be an agreement in writing sufficient to satisfy the requirements of an Act of Parliament though it is only verified by the signature of one of the parties: *In re Jones.* (1) Here the question is one of a bargain for the sale of goods. I doubt whether the objection which is here set up to avoid a business transaction would have been sufficient to support a special demurrer before the passing of the Common Law Procedure Acts. I think the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Cosmo Cran & Harper.*

Solicitors for respondent: *Bischoff, Coxe, Bischoff & Thompson.*

(1) [1895] 2 Ch. 719.

W. F. B.

THE KING *v.* RECORDER OF LEEDS.

Ex parte JOHN FOWLER & COMPANY (LEEDS), LIMITED.

1918
April 8.

Rating—Appeal to Quarter Sessions—Reduction of gross estimated Rental, but not of rateable Value—Unsuccessful Party—Costs—Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Quarter Sessions Act,* 1849 (12 *&* 13 *Vict. c.* 45), *s.* 5.

Sect. 4 of the Poor Relief Act, 1743, enables persons aggrieved by any rate or assessment made for the relief of the poor to appeal to the next general or quarter sessions, and the justices of the peace there assembled are authorized and required to hear and determine the appeal, "and the said justices may award and order to the party, for whom such appeal shall be determined, reasonable costs. . . . ."

By s. 5 of the Quarter Sessions Act, 1849: "Upon any appeal to any court of quarter sessions the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable. . . ."

Notice of appeal to quarter sessions was given by the applicants in respect both of the gross estimated rental and the rateable value of their premises. At the hearing of the appeal the question fought was the amount of the rateable value. The Recorder did not reduce that amount, but he expressed the opinion that the gross estimated rental was too high, and that amount was in consequence reduced. The formal order was simply "that this appeal be dismissed with costs." A rule having been obtained to bring up the order to be quashed on the ground that, as the applicants contended, the Recorder had no jurisdiction under the above sections to dismiss the appeal with costs inasmuch as the applicants had been partially successful in the appeal:—

Held, that as the question really litigated was the amount of the rateable value, and as upon it the applicants were unsuccessful, the Recorder had jurisdiction to make the order he did.

RULE NISI directed to the Recorder of Leeds requiring him to show cause why a writ of certiorari should not issue to bring up an order made by him upon the appeal of the applicants, John Fowler & Co. (Leeds), Ltd., from a certain rate or assessment for the relief of the poor, whereby it was ordered that the appeal should be dismissed with costs.

The applicants appealed to the Leeds Quarter Sessions against the gross estimated rental and the rateable value

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of their premises, fixed by the assessment committee at 16,300*l.* and 6300*l.* respectively. At the hearing of the appeal the question fought was the amount of the rateable value. In his judgment the Recorder expressed the view that the gross estimated rental had been fixed too high, that the figure for the statutable deductions should be that adopted by both parties in certain previous proceedings—namely, 7890*l.*—and that the result was that the gross estimated rental would stand at 14,190*l.* and the rateable value at 6300*l.* He then said that the appeal would be dismissed with costs. The formal order drawn up was in these terms: "Upon hearing counsel for the appellants and counsel for the respondents it is ordered that this appeal be dismissed with costs."

This rule was obtained on the ground that, as the applicants contended, there was no jurisdiction to dismiss the appeal and order them to pay the costs inasmuch as they had succeeded to the extent of obtaining a reduction in the gross estimated rental from 16,300*l.* to 14,190*l.*

Ryde K.C. (*Shepherd* with him) for the assessment committee showed cause. Under s. 4 of the Poor Relief Act, 1743, and s. 5 of the Quarter Sessions Act, 1849 (1), the Recorder had jurisdiction to make the order he did. The real question litigated was what was the rateable value of the premises. To that question and to that alone the parties addressed themselves, and upon it the applicants were unsuccessful. The formal order made does not refer to the reduction in the gross estimated rental, but even taking it that the Recorder reduced it, that figure had no relevance to the point that was being contested. The reduction in the gross estimated rental has no operative effect on local rates, and, outside the metropolis, has only a remote bearing upon taxation under Sched. A of the Income Tax Act.

Macmorran K.C. and *A. M. Latter* for the applicants. If the argument for the assessment committee is correct the effect is to strike out from the valuation list the figure for the gross estimated rental altogether. That figure is one

(1) The material words of these sections are set out in the headnote.

of great importance, and it is the practice of Surveyors of Taxes to adopt it for the purposes of Sched. A of the Income Tax Act: see observations of Rowlatt J. in *Gundry* v. *Dunham*. (1) It is clear that a person may appeal against the gross estimated rental of his premises although he does not appeal against the rateable value. In this case the notice of appeal was against both. The Recorder in fact reduced the figure for the gross estimated rental.

[BRAY J. His order does not say so. I assume that the assessment committee acted upon the Recorder's opinion that the gross estimated rental was too high and made the reduction he suggested.]

Although the Recorder says he dismissed the appeal, the fact is that he did not do so. If the applicants had not appealed they would not have obtained a reduction in the gross estimated rental. Having obtained that reduction they were thus partially successful and therefore the Recorder could not order them to pay the costs.

DARLING J. In my opinion this rule should be discharged. The applicants appealed to quarter sessions against an assessment, and what they wanted was a reduction of the rateable value of their premises. That is not in dispute. If they obtained a reduction of the rateable value they did not care whether the gross estimated rental was reduced or not. In dealing with the case the Recorder did not arrive at his decision by first fixing the gross estimated rental. He first arrived at the rateable value, and then by going into figures for the cost of repairs, etc., he ultimately argued back to the point at which the gross estimated rental came out at so much. But except indirectly that figure did not matter. We are told that it may matter as regards Imperial taxation, but what was before the Recorder was what should be the figure for the rateable value. The only question, therefore, is whether he was right in the order he made dismissing the appeal. It is true that the applicants gave notice of appeal as to both the gross estimated rental

(1) (1915) 7 Tax Cas. 12, 18.

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Darling J.

and the rateable value, but the appeal was really fought on the amount on which rates should be paid, that is, the rateable value. Upon that the applicants failed. The Recorder declined to reduce the rateable value, and he dismissed the appeal. In so doing I think he was right. If Mr. Macmorran's argument is correct, the Recorder should have said, "I allow the appeal as regards the gross estimated rental, and dismiss it as regards the rateable value." But, as I have said, in the particular litigation the assessment committee won and the applicants lost, and upon that state of facts I think the Recorder had power by virtue of s. 4 of the Poor Relief Act, 1743, and s. 5 of the Quarter Sessions Act, 1849, to make the order he did.

BRAY J. I am of the same opinion. It is sought to set aside the order of the Recorder on the ground that he had no jurisdiction to make it. The order he made was that the appeal should be dismissed with costs. If he had power to dismiss the appeal it is clear that he had power to dismiss it with costs. The question, therefore, is, Had he jurisdiction to dismiss the appeal? Having regard to the point raised before him—namely, what was the rateable value—I think he clearly had jurisdiction to dismiss the appeal and that he was right in doing so. It is true that in his judgment he expresses the opinion as to what the gross estimated rental should be, but when he dismissed the appeal he did not mean to make any order as to that. The order he made was simply that the appeal should be dismissed with costs, and he had jurisdiction to make it.

AVORY J. I agree that the rule should be discharged, but I do not assent to the view that it was no part of the order of the Recorder that the gross estimated rental should be reduced. If that were held to be so the applicants would be deprived of the alteration in fact made in consequence, an alteration which I think they are entitled to retain. I prefer to base my judgment on the ground that the Recorder was entitled, having regard to the conduct of the appeal, to say that it had really been fought upon the question of

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the rateable value, that all the costs had been incurred in discussing that figure, and that as the applicants had failed in altering it they had failed in their appeal. Accordingly he was entitled to dismiss it with costs.

Rule discharged.

Solicitors for applicants : *Peter Thomas & Clark, for Simpson and Curtis, Leeds.*

Solicitors for the assessment committee : *W. J. and E. H. Tremellen, for Emsley & Son, Leeds.*

J. S. H.

1919

Mar. 25.

In re GURWICZ.

Ex parte THE TRUSTEE.

Bankruptcy—Arrest of Debtor—Sureties—Money paid into Court by Sureties to secure Attendance of Debtor for Examination—Indemnification of Sureties—Right to Money paid into Court.

A debtor having been arrested pursuant to a warrant obtained by his trustee in bankruptcy on the ground of his attempting to evade attendance for examination under s. 25 of the Bankruptcy Act, 1914, an order was made for his release subject to the payment by two sureties of 200*l.* into court in lieu of their jointly entering into a bond to the senior registrar in bankruptcy, the 200*l.* to abide the further order of the Court.

Pursuant to the order, the sureties paid 100*l.* each into court, and the debtor's release was accordingly ordered. The bankrupt duly attended for examination under s. 25 of the Act of 1914, and consequently the 200*l.* had not been estreated. Facts were subsequently discovered which led the trustee to the conclusion that the two sums of 100*l.* were not the moneys of the sureties, but were the moneys of the bankrupt, and were handed to the sureties respectively by the bankrupt or his wife. The Crown did not set up any claim to the 200*l.*:—

Held, that owing to the illegality of the conduct of the bankrupt in having thus indemnified his sureties, neither they nor the trustee were entitled to the money, and that as no one else seemed to be entitled to it, it must remain in court.

APPLICATION for directions, under s. 79, sub-s. 3, of the Bankruptcy Act, 1914, by the trustee of the property of the debtor, J. Gurwicz, to a registrar in bankruptcy, and referred

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by him to the judge. The application by the trustee was for directions with reference to a sum of 200*l.* standing in court to the credit of this matter. In March, 1917, the debtor was confined in Brixton Prison pursuant to a warrant obtained by the trustee on the ground of his attempting to evade attendance for examination under s. 25 of the Bankruptcy Act, 1914. In April, 1917, the debtor applied for his release from prison. On April 4, 1917, an order was made for his release subject to the payment by two sureties, Solomon Tolkowsky and Jules Dirdak, of 200*l.* into court in lieu of their jointly entering into a bond to the senior Registrar in Bankruptcy, the said sum of 200*l.* to abide the further order of the Court. Pursuant to the order the sureties paid 100*l.* each into court on April 5, 1917, and the debtor's release was accordingly ordered. The bankrupt duly attended for examination under s. 25 of the Act of 1914, and consequently the 200*l.* had not been estreated. It appeared from an affidavit made by the trustee that his solicitors were subsequently engaged in tracing a large number of banknotes which had been the debtor's property and in his possession just prior to and after the date of the Receiving Order (January 31, 1917), and in course of this investigation they traced a note for 100*l.* paid into the Bank of England on April 4, 1917, as coming from Tolkowsky at or about the date of the payment, which note formed part of a sum of 500*l.* paid to the debtor on February 28, 1917, in respect of a cheque drawn by him to himself upon the account of J. Gurwicz, Ltd., at the London Joint Stock Bank, Fenchurch Street. In reply to their inquiry addressed to him as to how he had come by it Tolkowsky wrote a letter in which he admitted that he received it from the debtor's wife by way of indemnity for the amount which he was required to pay into court in the circumstances above mentioned.

In the course of the same investigation the trustee's solicitors traced another note for 100*l.* paid into the Bank of England on April 3, 1917, as coming from one S. Moed at or about the date of the payment, which note also formed part of the moneys paid to the debtor in respect of the above-mentioned

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cheque. The said Dirdak on being examined at private sittings with reference to this matter admitted that S. Moed was his brother-in-law, and that at the date the note was in the possession of Moed he was sharing an office with him and having transactions with him from time to time, and though he did not admit that he had also received it from the debtor or his wife under similar circumstances to Tolkowsky, the trustee submitted that the circumstances showed clearly that this note was so paid to him. Dirdak was employed by Tolkowsky.

The trustee submitted that in all the circumstances the above-mentioned sums should not be returned to Tolkowsky and Dirdak but should be paid out to him to be administered as part of the debtor's estate.

The debtor died on January 5, 1919.

By his report the registrar, after briefly stating the facts, reported that "Owing to the illegality of the conduct of the bankrupt in having thus indemnified his bail, neither his personal representatives nor his wife, supposing that the money was hers, can have any claim to recover this sum of 200*l.*: *Herman* v. *Jeuchner* (1); *Consolidated Exploration and Finance Co.* v. *Musgrave* (2); *Rex* v. *Porter.* (3) If the money was the bankrupt's money, Tolkowsky and Dirdak can have no claim to it. The question now arises whether the trustee is entitled to this money, or whether he has no higher title to it than the bankrupt. If the trustee has no right to the money it would go to the Crown. In the ordinary case of a bond for the appearance of a bankrupt being estreated the money paid thereunder would go to the bankrupt's estate: *In re Gordon.* (4) As this appears to me to be an exceptional case, I have thought it right to follow the directions of Wright J. in *In re Gordon* (5), and have adjourned this application to the judge, and have directed that the Solicitor to the Treasury, Tolkowsky and Dirdak should be served with notice of the application." The Crown did not set up any claim to the 200*l.*

(1) (1885) 15 Q. B. D. 561.
(2) [1900] 1 Ch. 37.
(3) [1910] 1 K. B. 369.
(4) [1903] 2 K. B. 164.
(5) [1903] 2 K. B. 164, 167.

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Tindale Davis for the trustee.

Branson for the Crown.

Neither Tolkowsky nor Dirdak appeared.

HORRIDGE J. The Crown does not set up any claim to this money and in my opinion no right by any principle of law has been made out to the 200*l.* in court. It had better remain where it is, and it will in due course go into the bankruptcy estates account. The trustee could not in any case be entitled to it, and no one else seems to be entitled to it. The money will remain in court, and the costs of both parties will come out of the estate.

Solicitors for trustee: *Hyman Isaacs, Lewis & Mills.*
Solicitor for Crown: *Treasury Solicitor.*

J. E. A.

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Mar. 12,13.

ROSS *v.* LONDON COUNTY WESTMINSTER AND PARR'S BANK, LIMITED.

[1919 R. 90.]

Banker—Customer's Account—Payment in of stolen Cheque—Liability of Banker—Negligence—Cheque payable to and endorsed by Public Official—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

Bill of Exchange—"Cheque"—Bill drawn on Banker by Himself—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 3, 73.

A banker to whom a private customer hands, for collection on his account, a cheque payable to and endorsed by a public official is put upon inquiry whether the customer is entitled to the cheque, and acts negligently if he credits the customer with the proceeds of the cheque without having made any such inquiry.

The Overseas Military Forces of Canada engaged in the European war had an estates office in England authorized by the Secretary of State for the Colonies to perform in accordance with statutory conditions the duties of collecting and distributing the estates of members of these forces dying in Europe. A sergeant employed at the office misappropriated during a period of ten months thirty-two cheques of the aggregate value of about 3,900*l.* representing money belonging to the estates of deceased soldiers. Each of the cheques was drawn payable to "The

Officer in Charge, Estates Office, Canadian Overseas Military Forces," and was endorsed generally by that officer under the same description with a view to its being sent to the Paymaster-General of these forces for payment of the amount to the beneficiaries, or in some cases directly to the beneficiary, and each cheque was crossed generally. The sergeant paid the first two cheques into a branch of the defendants' bank at which he had a small private account of his own and the rest of them into another branch of the bank which passed them on to the former branch. No inquiry was made at either branch whether he was entitled to the cheques, and at the former branch they were credited to his account and payment of them was received for him. In an action by the Paymaster-General against the defendants for damages for conversion of the cheques :—

Held, that the fact that the cheques were drawn payable to and endorsed by a public official should have put the cashiers of the defendants upon inquiry whether their private customer was entitled to the cheques ; that in crediting the cheques to him without any inquiry the cashiers of both the branches had been guilty of negligence ; and therefore that the defendants were not protected by s. 82 of the Bills of Exchange Act, 1882, from liability to the plaintiff.

An instrument is not prevented from being a cheque within s. 73 of the Bills of Exchange Act, 1882, by reason of the fact that it is drawn by a banker on himself.

ACTION in the Commercial List tried before Bailhache J.

The Overseas Military Forces of Canada consisted of the officers and men of the Canadian Army engaged in the European War, among whom were a considerable number of Russians. The organization included a Paymaster-General and an Accountant-General and their respective departments. By virtue of two instruments of authorization made by the Secretary of State for the Colonies on December 3, 1915, and July 13, 1917, respectively, the Accountant-General and any person or persons authorized by him were empowered by the Secretary of State to perform on his behalf in accordance with the Regimental Debts Act, 1893 (56 Vict. c. 5), and the regulations thereunder, the functions of receiving the estates of members of the said forces who might die during the war, of paying thereout their debts and expenses, of applying the residue to the representatives or beneficiaries in the United Kingdom, and of transmitting any balance to Canada for distribution. In order to assist in the performance of these functions there was formed as a separate branch of the department of the Accountant-General and under his

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supervision an Estates Office in charge of a specially appointed officer. The Estates Office collected the estate of a deceased soldier by obtaining from a person in possession of any part of it a cheque drawn payable to the officer in charge of the office, and as the office had no bank account of its own it handed over the estate to the beneficiaries either by sending the cheques so obtained, after endorsement by the officer in charge, to the Paymaster-General as the person charged with the receipt of the moneys, who took steps to transmit the amount to the beneficiaries, or, in certain special cases, by sending these cheques to the beneficiary directly. The estates of deceased Russian members of these forces whose beneficiaries were in Russia were sent for transmission to Russian banks in London; and in many cases where the Russian bank was unable to find the beneficiary it returned the money to the Estates Office by means of a cheque drawn upon another bank payable to the officer in charge of the Estates Office.

Among the officials employed in the Estates Office was one P. B. W. de Volpi, a quartermaster-sergeant, whose duties were, among others, to take charge of the files of documents relating to certain of the estates, to take cheques payable to the officer in charge in respect of these estates to that officer for endorsement, and after endorsement by him to take them to the Paymaster-General, or in some cases to send them to the beneficiary. In 1916 de Volpi opened a private banking account in his own name at the Herne Hill branch of a bank, of which the London County Westminster and Parr's Bank, Ltd., were the successors, by paying in about 12*l.* belonging to himself, and he from time to time paid into that account some other small sums of his own.

Subsequently, on various dates from May, 1917, to April, 1918, de Volpi misappropriated thirty-three cheques, of the aggregate value of 3916*l.* 16*s.*, representing money belonging to the estates of deceased soldiers which had been received at the Estates Office. Each of these cheques, with the exception of one for 10*l.* 7*s.* 8*d.*, showed on the face of it that it was payable to "The Officer in Charge, Estates Office, Canadian Overseas Military Forces," and was endorsed

generally by that officer under the same description, with a view to its being sent to the Paymaster-General of these forces for payment to the beneficiaries entitled, or in some cases to the beneficiary directly, and each cheque was crossed generally. Of these cheques one was drawn upon the Dominion Bank of Canada by that bank itself; one was crossed "account payee"; seven were crossed "not negotiable"; and twenty-three were drawn by Russian banks in London, the remaining ten being drawn by other banks or persons. De Volpi paid the first two of these cheques, for sums of 345*l.* 19*s.* 6*d.* and 19*l.* 13*s.* 8*d.* respectively, into the Herne Hill branch of the bank with which he had his account, but all the rest into the Berners Street branch of the same bank, which passed them on to the Herne Hill branch. No inquiry was made at either branch whether he was entitled to the cheques, and at the Herne Hill branch they were credited to his account and payment of them was received for him. On November 19, 1918, at the Old Bailey, de Volpi was convicted on his own confession of larceny of four of these cheques and sentenced to three years' penal servitude.

On January 27, 1919, the Paymaster-General of the Canadian Forces brought the present action against the London County Westminster and Parr's Bank, Ltd., his claim being for 3916*l.* 16*s.* as damages for the conversion of the cheques; but he afterwards withdrew the claim as to 10*l.* 7*s.* 8*d.*, the value of the cheque which was not payable to the officer in charge of the Estates Office.

The defendants in their points of defence alleged, inter alia, that they received payment of the cheques after obtaining them from de Volpi, who was a customer of their bank, for collection bona fide and without negligence, and that they relied upon the Bills of Exchange Act, 1882, s. 82. (1)

On behalf of the defendants the manager of their Herne

(1) Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

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Hill branch stated that de Volpi appeared to be a straightforward and substantial man; that on opening the account he said that he was expecting money from estates in Russia and from a business in Canada; that the staff at the branch who took cheques from customers and kept the ledger was at the times in question constantly changing and consisted partly of ladies; that he did not himself see the cheques paid in by de Volpi at the Herne Hill branch, these having been received by members of the staff; that he never saw the cheques paid in at the Berners Street branch, but merely got an advice note from that branch that they had been paid in and were to be credited to de Volpi's account; and that it was a common practice for a customer having an account at one branch of a bank to pay in at another branch. The witness admitted that if a private customer were to present to him a cheque payable to and endorsed by a public official, he would regard it as his duty to make inquiries before allowing the credit; and that if he had seen the cheques presented by de Volpi he would have asked him to explain how he obtained them. The head clerk from the Berners Street branch did not agree that the cheques ought not to have been received without inquiry.

Sir John Simon K.C. and *The Hon. M. M. Macnaghten* for the plaintiff. The defendants are liable for conversion of the cheques in question unless they are protected by s. 82 of the Bills of Exchange Act, 1882. They are not protected by that section unless they received payment of the cheques in good faith and without negligence. It is not suggested that they did not receive payment of the cheques in good faith. They did not, however, do so without negligence. De Volpi was merely a non-commissioned officer who had lately opened a small private account at one of the defendants' branches. The cheques which he presented were drawn payable to and were endorsed by a person so described as to make it apparent that he was a public official and also a trustee, and many of them were for large sums. In these circumstances it was the duty of the defendants'

employers engaged or assisting in collecting cheques for their customers to inquire whether de Volpi was entitled to these cheques before collecting them for him. The employees at both the Herne Hill branch and the Berners Street branch disregarded that duty and were guilty of negligence, and the defendants therefore are not protected by s. 82. The employees at the Berners Street branch were even more negligent than those at the other branch, because they received the earlier cheques from de Volpi before they had any personal knowledge of him. In the case of the cheque crossed "account payee" the duty and the corresponding negligence of the defendants were even higher than in the case of the other cheques. As one of the instruments in question was drawn by a bank upon itself and not upon another person it was not a "cheque" within the definition of that term given in the Act of 1882 (see ss. 3 and 73), but rather a promissory note, and, therefore, in respect of that instrument the defendants are not protected by s. 82, which applies only to cheques.

Douglas Hogg K.C. and *A. Neilson* for the defendants. The defendants received payment of the cheques for de Volpi without negligence, and they are protected from liability by s. 82 of the Act of 1882. If these cheques had been payable to and endorsed by a private person the defendants could have collected them for de Volpi without negligence even although they had made no inquiry as to his right to them. There is no ground for saying that, merely because the cheques were payable to and endorsed by a public official, the defendants were guilty of negligence in collecting them for de Volpi without inquiry. The fact that the employees of the defendants whose regular duty it was to collect cheques for their customers made no such inquiry, and the express statement of the chief clerk at their Berners Street branch that such an inquiry was unnecessary, are some evidence that they were under no obligation to make the inquiry. It is true that the manager of the Herne Hill branch stated that if he had seen these cheques he would have thought it his duty to make inquiry, but the subordinate members of the

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bank's staff whose duty it is to receive cheques from customers and to keep the books cannot reasonably be expected to possess so much experience and skill as the manager possesses. See per Channell J. in *Bevan* v. *National Bank.* (1)

The cheques in question were paid in from time to time over a period of nearly a year, and even assuming that the defendants were negligent in receiving the earlier cheques, the absence of any complaints in regard to these cheques would tend to allay their suspicions and exempt them from liability for negligence in respect of the later cheques : *Morison* v. *London County and Westminster Bank.* (2)

The instrument drawn by a bank upon itself is a " cheque " within the definition of that term in the Act of 1882.

Sir John Simon K.C. in reply. A cheque drawn payable to a public official should put not only the manager of a bank but also the officials whose duty it is to receive cheques upon inquiry as to the title of a private customer presenting the cheque. The case of *Bevan* v. *National Bank* (3) is distinguishable, because the matter there in question was one of which the manager might well have special knowledge. The negligence of the defendants did not cease after several of the cheques had been collected without question. This case, in which there was one continuous series of transactions, differs from *Morison* v. *London County and Westminster Bank* (2), where there were two distinct series of transactions separated by a considerable interval of time, the earlier of which had taken place without question.

BAILHACHE J. This is an action brought by the Paymaster-General of the Canadian Overseas Military Forces against the London County Westminster and Parr's Bank, Ltd., for damages for the alleged conversion of thirty-two cheques of the aggregate value of over 3900*l.*, which were misappropriated by one de Volpi, a quartermaster-sergeant employed in the Estates Office of these forces and credited by the defendants to his private account at their Herne Hill branch.

(1) (1906) 23 Times L. R. 65, 69. (2) [1914] 3 K. B. 356.
(3) 23 Times L. R. 65.

The cheques were all drawn payable to the officer in charge of the Estates Office, and were endorsed generally by that officer, and crossed generally.

The defendants rely upon s. 82 of the Bills of Exchange Act, 1882. In order that they should be entitled to the protection of that section it is necessary that they should have received payment of the cheques for their customer in good faith and without negligence. The plaintiff does not suggest that the defendants received payment of the cheques for de Volpi otherwise than in good faith, but only that they did not do so without negligence.

The question is whether the employees of a bank authorized to receive its customers' cheques, to whom a private customer presents for collection a crossed cheque payable to and endorsed by a public official, ought, before treating the customer as the person entitled to the cheque and receiving payment of it for him, to make inquiry as to the customer's title to the cheque, and in the event of their failing to do so are guilty of negligence. Very little evidence has been given in regard to the point. The manager of the defendants' Herne Hill branch stated that, if the cheques had been presented to him by a private customer of the bank, their form would have aroused his suspicion, and he would have asked the customer to explain how he obtained them. On the other hand the chief clerk at the Berners Street branch, where most of the cheques were paid in, stated that he would probably have taken the cheques without inquiry, and the employees who actually received the cheques at both branches apparently saw nothing in them to arrest their attention. I recognize that the same degree of intelligence and care cannot be looked for in a cashier as in an official higher in authority, such as a manager, and I am told that during the period in question the cashiers and clerks at these branches were being constantly changed, and that some of them could not have had very long experience of their work. I must, however, attribute to the cashiers and clerks of the defendants the degree of intelligence and care ordinarily required of persons in their position to fit them for the discharge

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of their duties. It is therefore necessary to consider whether a bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them. Each of the cheques in question was drawn payable to "The Officer in Charge, Estates Office, Canadian Overseas Military Forces," and was endorsed by that officer under the same description. Each cheque bore upon its face the fact that it was payable to the officer of a public department and not to a private person, and the endorsement on each cheque showed that it was being negotiated by that officer. It is not in accordance with the ordinary course of business that a cheque so drawn and endorsed should be used for the purpose of paying the debt of a private individual. It was highly improbable that the officer in charge of the Estates Office would hand to de Volpi cheques in this form with the intention that the latter should pay them into his private account. It therefore seems to me that when de Volpi presented these cheques with a view to having them credited to his private account a cashier of ordinary intelligence and experience should have been put on inquiry whether or not the credit ought to be made. I have come to the conclusion that the employees of the defendants in treating de Volpi as the person entitled to the cheques and in receiving or assisting in receiving payment of the cheques for him without making any inquiry whether he was entitled to the cheques, failed to exercise due care and were guilty of negligence, and therefore that the defendants are not within the protection of s. 82.

It was contended that there was greater negligence on the part of the employees of the Berners Street branch than on the part of those at the Herne Hill branch. That contention was based on the allegation that the first few cheques paid in at the former branch must have been paid in before the employees of that branch could have had any personal knowledge of de Volpi. That may no doubt be true, but, if it is, it in no way affects the conclusion

at which I have arrived that there was negligence at both branches.

The cheques were paid in from time to time over a period of about ten months, and it was argued on behalf of the defendants that even if they were negligent in taking the earlier cheques for de Volpi without inquiry, yet, as they continued to do so without any cause for suspicion arising, a point of time should at length have arrived at which their suspicions would cease, and they would no longer be negligent in taking the cheques without inquiry. I do not think that a point of time was ever reached at which the defendants ceased to be negligent.

One of these cheques differed from the others in that instead of being crossed generally it was crossed "account payee," and therefore the observations which I have made in regard to negligence apply to this cheque with even greater force than to the others.

One of the instruments in question was drawn upon a bank by that bank itself, and it was said on behalf of the plaintiff that an instrument so drawn was not a "cheque" within the meaning of the Bills of Exchange Act, 1882, and therefore that s. 82 did not apply to it. I think that instrument was a cheque, and for this purpose comes within the same category as the others.

As regards one of the cheques sued for of the value of 10*l.* 7*s.* 8*d.* the plaintiff has abandoned his claim. As to all the other cheques sued for the defendants have been guilty of negligence disentitling them to the protection of s. 82 of the Act of 1882, and as to these cheques there will be judgment for the plaintiff for 3906*l.* 8*s.* 4*d.*

Judgment accordingly.

Solicitors for plaintiff: *Lawrence Jones & Co.*

Solicitors for defendants: *Donald McMillan & Mott.*

J. R.

END OF VOL. I.

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